Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

v.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Petitioner Philip Jay Fetner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania in the above-entitled case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania, not yet reported, appears in the Appendix hereto. The

opinion of the Court of Common Please of Bucks County, also unreported, is reprinted in the Appendix as well.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on September 14, 1979. A timely petition for reargument was denied on January 9, 1980 by the Superior Court. A petition for Allowance of Appeal was denied on December 10, 1979, by the Supreme Court of Pennsylvania, Eastern District. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Whether the trial court by its regulation of pre-trial discovery and conduct of the trial itself so abused its discretion as to deny petitioner the due process of law assured by the Constitution of the United States?

2. Whether the loan program of respondent is subject to the anti-fraud and registration provisions of the Federal Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

Fourteenth Amendment

United States Code:

Securities Act of 1933

Securities Exchange Act of 1934

Farm Credit Act of 1971

STATEMENT OF THE CASE

On June 5, 1974, petitioner entered into an Agreement of Sale to purchase a farm in Bucks County, Pennsylvania. Sbusequently thereto, respondent agreed to provide a first mortgage loan and made a number of representations to petitioner concerning the Farm Credit System.

In direct contravention of the Agreement of Sale, the sellers in July of 1974 covertly granted an easement of roads to the Pennsylvania Department of Transportation (PennDot) across the land subject to sale. The deed of easement was not recorded until October 1, 1974. On October 9, 1974, petitioner made settlement on the property. Petitioner was ignorant of the existence of the deed of easement, and a policy of title insurance issued to petitioner insuring him against any defect, lien or encumbrance on the title failed to disclose the recorded easement.

At closing, petitioner executed and delivered a Mortgage Bond to respondent in the principal amount of one hundred seventeen thousand five hundred dollars ($117,500.00). The loan was made through the intermediary of the Southeast Federal Land Bank Association. Every borrower, including petitioner, who obtains such a loan automatically becomes a voting member of said Association, which Association in turn is fully owned by local stockholder members, by purchasing stock or participation certificates equal to five percent of the loan. Thus, on October 9, 1974, petitioner purchased stock in the amount of Five Thousand Eight Hundred Seventy-Five Dollars ($5,875.00).

In the spring of 1975, subsequent to taking possession of the farm, petitioner learned of the easement. At the

same time, PennDot began the construction of a major highway across petitioner's property, destroying a natural border of trees, shrubs and plantings, which severely altered the character and reduced the value of said property. Shortly thereafter, petitioner sued the sellers, the real estate agents, PennDot and Commonwealth Land Title Company for, *inter alia,* fraud and sought, *inter alia,* rescission of the sale.

During subsequent discovery in that case, questions were raised as to the possible complicity of respondent and its local agent acting in concert with the defendants. At the same time, respondent acted in ways contrary to its representations made in 1974 prior to the loan transaction. Lengthy discussions ensued, and petitioner months later stopped mortgage payments.

During subsequent settlement discussions, respondent commenced this action in mortgage foreclosure against petitioner by complaint filed on March 16, 1977. Respondent demanded judgment in the amount of $137,195.45, representing alleged unpaid installments, accelerated principal, default interest, certain real estate taxes and attorney's commission. Petitioner filed Preliminary Objections challenging plaintiff's capacity to sue, demanding a more specific pleading, asking to strike the claim for 10% attorney's fees and seeking a general demurrer. Preliminary Objections were overruled by the Court of June 23, 1977, whereupon petitioner filed an Answer, New Matter and Counterclaim. The Answer specifically denied respondent's allegations. New Matter reiterated the issues of the Preliminary Objections and set forth the stockholder relationship between plaintiff and defendant.

The Counterclaim, consisting of eleven counts, generally alleged that material misrepresentations of

respondent fraudulently induced the mortgage contract, that respondent tortiously harmed petitioner in attempting to cover up the original fraud and force foreclosure and was in breach of the loan contract, and that respondent also had violated the Federal Securities Laws. Petitioner sought rescission of the entire transaction, plus interest and damages.

Respondent filed a responsive pleading thereto in the form of a general denial (Answer) without asserting any further New Matter or raising any objection to the Counterclaim as stated. The issues thus joined, petitioner served upon respondent three sets of Interrogatories. (Respondent took no discovery.) None were answered in a timely fashion; the months' delay went well beyond the time allowed by the Rules of the Court. Moreover, the interrogatories were answered in a most evasive fashion. Documents produced were inaccurate or incomplete (*e.g.,* the Indemnity Agreement produced in response to Question No. 5 of the First Set). Many questions were answered simply "not applicable," or "none." Attempts to get at the substance of the transaction were met with the answers that the people involved were not "employees" of plaintiff (they were, in fact, employees of plaintiff's agent) or similar tactics of applying technical status identification to avoid answering the questions.

At one point (Answer No. 4 to the Third Set), plaintiff even declared that "there is no relationship between Russell Albright and The Federal Land Bank of Baltimore," quite an assertion in view of the fact that Albright was employed by the Norristown Federal Land Bank Association (later changed to "Southeastern Federal Land Bank Association"), which was both an owner and agent of the plaintiff.

Other answers appeared on their face to be falsehoods (such as plaintiff mortgagee did not receive the preliminary title report or the property survey) and were in fact directly contradicted by later testimony of plaintiff's agent. Counsel for the petitioner immediately telephoned and wrote plaintiff's counsel pointing out deficiencies and asking that they be corrected without the necessity of a Motions for Sanctions. No reply was ever received. Moreover, it should be emphasized that the entire Third Set was sent because of respondent's failure to answer adequately the prior two.

Based upon the "answers" to the First set, petitioner sent to respondent a list of five individuals, all employees of plaintiff-respondent or its agent, as proposed witnesses of whom he intended to take depositions. Recognizing the business nature of the witnesses and in some instances their distance from Bucks County, petitioner asked for alternative dates so that depositions would be taken at mutually convenient times. In fairly reviewing the "jockeying" that followed between counsel, two conclusions can be reached: on the one hand, counsel for petitioner attempted to do everything possible to satisfy the scheduling problems raised by respondent, while, on the other hand, respondent's counsel resorted to a posture of utter non-cooperation. Initially refusing to produce the witnesses, he later insisted that depositions be taken only in Baltimore, Maryland, and at the sole convenience of plaintiff's employees.

While this discussion as to depositions and the adequacy of answers to Interrogatories continued, plaintiff filed a Motion, under the affidavit of plaintiff's counsel, averring that discovery was not complete but requesting that the Court limit the time of discovery and thereafter set a hearing date. Paragraph 6 of said Motion stated:

> The Defendant has pursued a great deal of discovery and intends to take deposition of various officers of the Defendant [*sic*]. At the time of this Motion all discovery has not been completed by the Defendant. Plaintiff is willing to participate in reasonable discovery proceedings.

Paragraphs 8 and 9 read:

> Plaintiff believes that because of protracted discovery proceedings by the Defendant, the setting of a hearing date under normal court procedures will cause an unnecessary delay.
>
> Plaintiff requests a hearing date be scheduled at the present time rather than waiting for completion of discovery.

It is worth emphasizing at this point that so-called "protracted discovery" at this time amounted to some seven pages of widely spaced answers to Interrogatories that would take a person of average intelligence no more than five minutes to read. One of these pages, for example, repeated the phrase "Not applicable" four times (triple-spaced) and the word "None" nine times (double-spaced). And, again, the Third Set of Interrogatories was simply an attempt to get plaintiff to answer the First Set.

To this Motion, counsel for the defendant sent a letter to counsel for plaintiff and to the Court Administrator advising that several "facts" set forth in the Motion were disputed and that the matter was hardly ripe for a hearing. No disposition was made of this Motion. Unaccountably and shortly thereafter, without any praecipe being filed, counsel for plaintiff filed another motion indicating that discovery was now complete and requesting a trial date. Plaintiff was well aware of the disputed averments of the Motion, yet did not proceed

by Petition and Rule Returnable. A second letter of protest was dispatched by defendant's counsel. Equally unaccountable, the Court then quickly set a trial date a few weeks away.

Defendant thereafter filed a Motion for Sanctions. This Motion was never disposed of.

Prior to the hearing date, at the request of counsel for the defendant, a conference was held with the trial judge, and a Petition To Strike the matter from the trial list was handed up. No Rule Returnable was set and no disposition of the Petition was made. The Court ordered instead that the parties engage in good faith discovery over the next week, that is, the week that preceded the trial, and further permitted the deposition of only two parties, Russell Albright and Richard Carpenter.

The deposition of Albright began on the following Monday. On that day, a severe blizzard, one of the worst in Bucks County history, hit the area, and the Court House was closed at approximately 12:30 p.m. and the deposition postponed. The Court House was closed the next day, Tuesday, while the area struggled to recover from the storm. On Wednesday, the deposition of Albright was resumed. Unfortunately, it had to be interrupted so that the deposition of Richard Carpenter could begin—Wednesday being the only day that Mr. Carpenter, who had travelled from Baltimore, was to be made available. The deposition of Carpenter was only partially completed. Informal contract with the trial judge indicated that the trial would proceed whatever the results of the deposition process. On Thursday, the deposition of Russell Albright was substantially concluded. At the close of Albright's deposition, counsel for plaintiff indicated that he would supply a copy of a certain document (the appraisal report) in

plaintiff's possession to counsel for defendant on Friday afternoon.

On Friday afternoon, respondent's counsel refused to supply the promised documents.

No transcripts of the depositions were made available prior to the trial. At the time of trial, a Petition to Strike the matter from the list and a Motion for a Continuance were presented to the Court by petitioner. Both were refused.

During the course of the trial, held on February 15, 1978 without jury before Judge John J. Bodley, the Court made numerous evidentiary rulings contravening the rules of civil procedure, refused to permit complete cross-examination of witnesses, and refused to permit testimony in support of the pleadings advanced by petitioner in the Answer, New Matter and Counterclaim. Indeed, no evidence on the Counterclaim was allowed at all. Petitioner was ordered from the stand in mid-testimony, whereupon the Court abruptly entered judgment. Counsel was not permitted to make any final argument.

The trial judge simply viewed the case as a "straightforward mortgage foreclosure"—time and again, reference was made to this theme and to some inability by petitioner to make mortgage payments, an assumption that was never pleaded nor as to which was a single word of evidence offered:

> "You know as well as I do that you [Defense Counsel] and I would not live in our homes if we did not pay our mortgage payments since last July of '76." [Trial Transcript, p. 105, lines 14-17.]

". . . he can't live on this place and enjoy the property without paying for it, and he hasn't paid for it." [Trial Transcript, p. 107, lines 23-25.]

"It's somebody else's money that's being used to permit him being there, not his." [TT, p. 108, lines 22-23.]

Interrupting the *first* witness for the defense:

"I have given you [Defense Counsel] the opportunity to establish this so-called fraud or fraudulent inducement, and you haven't done it, *and you're not going to do it.*" [TT, p. 109, lines 12-15.] [Emphasis added.]

and

"If I were to do anything more than to speak bluntly to you about this situation, I just wouldn't be fair to myself, because I don't believe in going through motions where there is no merit in something." [TT, p. 109, lines 16-20.]

Indeed, as Judge Bodley stated in his opinion:

"It should be added, gratuitously, that had Plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith." [p. 11]

"Does it matter how much a man, who cannot make his mortgage payments, tries to put off foreclosure?" [TT, p. 146, lines 20-22.]

"I don't like hypocrisy. I find it all through that Answer and New Matter. . . . I see a mortgagor who has been unable to meet his payments. I'm sorry for him." [TT, p. 158, lines 3-4.]

"This is a financial institution that probably loaned him more than they should have loaned him, as it turns out. It is unfortunate for all parties." [TT, p. 158.]

It must ruefully be admitted that petitioner-defendant inadvertently fueled Judge Bodley's prejudices. In an attempt to show one element of the fraudulent inducement or, alternatively, breach of the mortgage contract, defendant introduced evidence concerning an earlier period when, confronted with certain financial difficulties, he was denied the much stressed leniency that formed a cornerstone in the Land Bank's mortgage inducement. The distinction between that time, which ended when defendant paid all arrearages pursuant to an agreed upon workout arrangement, and the period after July 1976 was, however, lost upon the trial judge.

On page 155 of the Trial Transcript occurs the following exchange, in which defense counsel tries to establish the events surrounding the *earlier* workout arrangement:

[Mr. Beckert] Did you [Defendant] ask Mr. Albright whether the payments could be extended beyond the March deadline?

[Mr. Hershenson] I object.

[Court] Sustained. Of course he asked right up until the date of foreclosure, I suppose.

This remark illustrates well the problem of this trial. "Of course," there was no such testimony indicating anything of the kind—neither at trial nor during discovery—and nothing in the pleadings so to indicate. Quite the contrary.

Timely exceptions were filed with the Court en banc. By decision dated September 8, 1978, Judge Bodley, writing for the Court, dismissed the exceptions.

At no time did the Court address the Federal Securities Law question raised. The Opinion is reproduced in the Appendix.

Petitioner posted security and appealed. The appellate court in essence refused to interfere with the discretion exercised by the lower court. (The Opinion is reproduced in the Appendix.) A number of issues were not even addressed by the Superior Court, among them the Federal Securities Law questions. Petition to reargue was denied. Allocatur to the Pennsylvania Supreme Court was refused.

REASONS FOR GRANTING THE WRIT

DUE PROCESS

At the outset, it must be admitted that due process claims in civil cases do not have the same glamour as their criminal counterparts. That may be unfortunate for petitioner, given the fact that his home, substantial sums of money and several years of endeavor are directly involved. Nevertheless, petitioner is willing to assume a heavier burden in demonstrating the importance of this case: to allow the abuse of discretion shown here to stand would give a trial judge, any trial judge, sitting without a jury, the right to exercise virtual dictatorial powers, unfettered by the basic safeguards of our civil process.

Furthermore, what perhaps is difficult to convey simply from reading the record was the harassing, sarcastic and injudicious tone used throughout by the trial judge. And not all the offensive remarks from the bench, including *sub votto* asides, were recorded in the transcript. In the aggregate, defense counsel was placed under considerable strain in attempting intelligently to pursue his case.

In order to place the necessity for fair discovery in this case in its proper context, it should be emphasized

that this was in large part a fraud case. The Counterclaim alleged throughout that plaintiff had knowingly participated in a fraud upon defendant and that, when defendant suspected or discovered the fraud, employees of plaintiff had sought to force foreclosure in bad faith in an attempt to moot possible liability for the fraud. Fraud is difficult to prove in any case but ever more so when a corporation, bank or other institution is involved. Numerous diverse matters, documents, statements and the like would normally be required to challenge the "party line." Institutions and/or their agents can be expected to proceed with some sophistication and draw the wagons in a tight circle. What might seem routine or be alleged as routine may appear wholly different in its proper context if the internal workings of the institution and its paper work were understood. Moreover, the case also involved securities law questions, and the relationship of the various components of the Land Bank system to each other and to the defendant were of crucial significance.

It should, moreover, not be necessary to note that discovery need not be absolutely related directly to a relevant fact but would be appropriate if it could lead to probative information. And this case is vritually a textbook example of the need for intelligent and thorough discovery.

Counsel is aware of the very real and necessary concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be all too common. Unnecessary intrusions into privacy, high costs, and the unfair use of the discovery process as a lever for settlement have come to be part of some lawyers' trial strategy.

In no sense, however, was the discovery sought here by defendant even remotely a fishing expedition. For example, all the questions asked during depositions laregely met without objection, went directly to the Complaint and Answer, New Matter and Counterclaim. Every attempt was made to promote the early identification of issues in a potentially complex litigation both to reduce the cost of discovery and to expedite litigation.

Discovery allowed in this case was, however, a sham. Plaintiff successfully answered Interrogatories in manifestly bad faith, obscuring the identity of witnesses, documents and relevant transactions and repeatedly ignoring the plain meaning of the questions. Plaintiff successfully blocked depositions by filing inconsistent, under affidavit of counsel, Motions, proceeding by Motions rather than Petition and Rule in violationg of the express provisions of the local Rules of Court. Even the briefest perusal of the allowed deposition transcripts will show that Albright frequently resorted to "stonewalling," incredible lapses of memory about the most basic aspects of his job (including such matters as the limits of his discretionary authority), and to pleading ignorance of the most elemental facts. At one point, he even went so far as to say that he simply could not tell what the "Farm Credit Service" was, although his picture appeared under that caption in a bimonthly publication prepared by his employer and the phrase also appeared on his own stationery. Predictably, the testimony indicated the need to depose others, in particular Albright's immediate superior, Herbert Kratz.

Richard Carpenter, for his part, was totally unresponsive, to the point where it may be seriously questioned whether counsel for plaintiff did not knowingly mislead the Court during the conference that preceded ordering

the truncated depositions where he made several representations as to the competence and appropriateness of deposing Carpenter (to the exclusion of other officers or employees of plaintiff). Much of Carpenter's testimony related as to how the questions asked were better directed to others! At the very best, his testimony indicated the wisdom of seeking originally to depose the five employees of plaintiff or its agent already mentioned. And, predictably, plaintiff's counsel during the deposition process was less than cooperative—even to the point of breaking a promise made to produce certain records.

The original injustice of limiting drastically defendant's discovery was compounded time and again as the seemingly inexorable trial date approached. Only maximum cooperation by plaintiff would have proved even remotely satisfactory in such a brief period. Although the Court did not have the transcripts to rule on the Motion for Continuance presented at the trial, there was nothing in the history of the case to suggest that such cooperation would be forthcoming. To the contrary, the entire course of conduct by plaintiff showed that it feared and did everything to prevent any sort of good faith discovery. And the plain fact was that the weather prevented the deposition from being concluded.

While it may readily be admitted that the trial judge has wide discretion in ruling on such a Motion, can it be doubted that the discretion was manifestly abused here? In light of Judge Bodley's view of this case, is there any doubt that had the weather cancelled the depositions altogether the trial would still have proceeded? The lack of transcripts (a partial transcript was provided during the luncheon recess, *see* TT, pp. 24-25) were brushed aside by the Court at the opening of the trial as meaningless.

That the events of the trial challenge all semblance of fairness and judicial propriety is an understatement.

Petitioner's first set of interrogatories to respondent requested, under Interrogatory No. 11, the name and address of all witnesses whom respondent planned to call at the trial of this matter. Respondent-plaintiff responded as follows: "Unascertainable at this time. Plaintiff will furnish Defendant with a list of witnesses when ascertained." No supplemental answer was ever filed listing said witnesses, nor was this ever done informally. Plaintiff's counsel called two witnesses to the stand, and defendant objected based upon this failure to disclose. Said objections were brushed aside by the Court, in clear violation of current procedural practice.

The seminal case on this point is *Nissley v. Pennsylvania Railroad Company*, 435 Pa. 503 (1969). In ruling that a surprise witness could not testify even when the interrogatory requesting the name of witnesses was overbroad, the Court stated in part:

> The several revolutions which have occurred in the field of procedure, insofar as they relate to problems of pre-trial discovery, have had as their principal focus the desire that a case should be an inquiry into the facts of the case with each party in a position to examine the evidence upon which a decision will rest. We have moved away from what was described as the "sporting theory of justice" and have embraced a theory of wide ranging and mutual discovery. One advantage of discovery is the protection it gives the adversary against surprise evidence which can be proven false or which can be put in a truer or less damaging light if there is opportunity to investigate the matter and produce rebutting or qualifying facts.

435 Pa. at 507.

The *Nissley* decision has been followed recently in the matter of *Moore v. Howard P. Foley Company*, 340 A.2d 519 (1975).

In the case before us, especially as to the witnesses John R. Wright, respondent's sole explanation was that Mr. Wright was unknown to them as a witness until just prior to the date of trial! But Mr. Wright is the Manager of Data Services for the computer company employed by respondent. This is not a matter of an unknown witness suddenly appearing, but of respondent simply refusing to disclose his name prior to trial. Such strategy does not permit defendant any opportunity to depose said witness, for example, to understand the manner in which plaintiff's books were kept to determine whether they were accurate in light of the testimony offered by this witness.

The first witness testified to the nature of the Federal Land Bank of Baltimore as an "instrumentality" of the Federal government. The importance of this question and the self-serving character of the testimony is beyond doubt. When petitioner on cross-examination sought to question this concept, Judge Bodley declared that beyond the scope of cross-examination and a matter which ought to be presented by way of defense (TT, p. 12). Plaintiff's steady stream of objections to any questions dealing with the nature of the Farm Credit system were sustained. (Subsequently, however, when defendant tried to introduce the subject by way of direct testimony in defense, the Court ruled it out of order!) What sort of information was given to the public through published brochures, the Bank's functioning as a private corporation, whether it actually received any money from the Federal government—all this and more were not permitted.

The second witness introduced by plaintiff testified as to the procedures and accuracy of the billing system (both challenged by defendant in his responsive pleadings). He sought to establish the amounts and character of the alleged defaults but admitted that neither he nor his organization (a regional computer service) had any way of knowing if these amounts actually belonged to defendant or his property except as reported by plaintiff (TT, pp. 22-23, 27). The computer service was merely mechanical and the accuracy of their records depended entirely upon information supplied by the local Federal Land Bank Association (TT, pp. 30ff).

Defendant's attempt to show errors in computation was not allowed by Judge Bodley as having "nothing to do with default or no default" (TT, p. 43). The Court's view was that in the face of "default"—*i.e.*, a computer record of non-payment—nothing further need be said, not even as to the particular figures which were stated as those upon which the default was alleged to have been predicated. The Judge even went so far as to state that defendant "acknowledged default" (TT, p. 44, lines 8-9), which was absolutely false as a reading of the pleadings and testimony will readily show.

In the middle of cross-examination, Judge Bodley simply excused the witness (TT, p. 46). Whereupon, plaintiff rested his case.

Defendant called Albright "as on cross" and proceeded to attempt to prove the misrepresentations that arguably gave rise to fraudulent inducement. Whereupon, the Court sustained all objections to relevant matters: how Albright represented the Land Bank system to defendant and what was told defendant in discussions with Albright. "Let us get to the fraud" (TT, p. 59) became the battle-cry of the Judge, but his bias that the entire hearing was

a waste of time became a self-fulfilling prophecy when he refused to allow any questions that went to what Albright actually said or did. At one point, Judge Bodley went so far as to say: "whatever representation was made, it would not amount to fraud." (TT, p. 62, lines 24-25). Furthermore, the Court permitted no testimony on any matters after the settlement date.

Albright was also excused by the Court in the middle of cross-examination.

The Court's rulings as to cross-examination cannot be justified under even the most stringent view of that aspect of trial practice. Cross-examination is appropriate to elicit the circumstances that would explain direct testimony, to impeach credibility or show bias, or to test the witness's knowledge or recollection of matters. *See, e.g., Kaplan v. Loer,* 327 Pa. 465 (1937); *Valentine v. Federal Insurance Company,* 111 Pa. Superior 311 (1934). Moreover, at several points, the Court, always condescendingly, suggested to counsel for defendant a manner of cross-examining these witnesses. Matters of credibility and fraud are particularly difficult to deal with in terms of a corporate organization. Neither can be discovered or fully documented in a trial where the witnesses who are to be cross-examined know that the judge has taken the attitude that the likelihood of fraud is non-existent and that he is not going to permit any sort of cross-examination into the matters in question. The method of cross-examination is not really a matter of evidentiary proceedings, but more a matter of trial strategy and tactics. That, as well, was limited by the Court, even where the substance of the matters to be pursued was apparently unobjectionable.

When Defendant was put on the stand, the trial judge made it impossible for him to tell the facts of the

dispute. Defendant was not allowed to testify as to conversations with Albright. And all contacts between the Land Bank and petitioner after settlement were foreclosed (TT, p. 138). The Court then went on to rule that it would permit no evidence to be introduced on the Counterclaim, a ruling that also negatively affected petitioner's defense of the Complaint, since several of the issues raised in the Counterclaim and New Matter related specifically to the defense of the claim. The Court even declared that it was irrelevant that the Counterclaim was not challenged by way of Preliminary Objections—"a very sensible decision on the part of plaintiff's counsel in order to get the matter disposed of" (TT, p. 161, lines 23-25).

It is submitted that all such evidence, if testimony were permitted thereon, would have been of a character which, if accepted and believed, would have established a cause of action against the plaintiff on behalf of the defendant.

The hearing ended rather dramatically: without much further ado, the Court ordered defendant to step down, threatened defendant with contempt when he [confused] hesitated, foreclosed all other questioning, lectured defendant and his counsel and accused them of not believing their own defense (TT, p. 160) and attempting to "kid" him (TT, p. 162). He ordered judgment for plaintiff, not permitting counsel at any time to make final argument on any matters of law or law and fact.

There can be no doubt that a trial court has general and wide authority to conduct an actual trial; that authority is necessary at the least to preserve order and decorum. Nonetheless, the basis of our system of justice and our adversary proceeding is the right of cross-examination. That right, apart from the question of

any evidentiary rulings made, was denied petitioner by dismissing witnesses before the conclusion of their cross-examination. The Court made no justification for these rulings, nor explained them in any way. Rather, it merely dismissed those witnesses over the objection of counsel. It is difficult to understand how an adversary hearing can be held if such a position is tolerated.

Moreover, the refusal to permit defendant to complete his own testimony is perhaps the most inexcusable of all. In the middle of the defendant's testimony, when he stated that he believe that he was not actually in default, to force him to leave the stand and to allow him to say nothing further on his own behalf, and then to refuse an additional testimony that might have been offered on defendant's behalf, totally usurped from counsel and totally denied the defendant the right to a full and complete hearing. No amount of discretion could possibly permit such a standard. To allow such conduct would permit any trail court, sitting without a jury, at any time, to excuse any witness or exclude consideration of any other testimony without knowing the nature of that testimony and to decide the case in the ensuing vacuum.

The Court also foreclosed entirely the right to present final argument. While, in a trial before a judge only, the right of final argument is not absolute, in a case where the pleadings raised substantive legal issues, as here, it would be extraordinary were not the right to conclude offered. The conclusion of this trial speaks for itself.

Due process has perhaps been most eloquently described by Daniel Webster as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." It is that fundamental standard which regretfully petitioner must submit was

not adhered to in this case. As early as page 2 of the transcript and certainly by page 3, the Court was apparently taking the position that the proceedings were merely an exercise in futility. As the trial progressed, it was abundantly clear that in terms of an orderly disposition of the matter, there were not two adverse parties and a disinterested trier of fact, but a trier of fact who throughout the case seemed to indicate that the matter had already been resolved. For example, beginning on page 103, the Court purported to sum up a stream of facts, some of which are simply non-existent in the record and some of which the Court apparently inferred from the pleadings or some other source, which led to the conclusion that, irrespective of the pleadings and irrespective of the fact that testimony had hardly been completed, it had foreclosed the weighing of any further evidence and had purely and simply decided the matter at issue. It would be hard to imagine a situation more violative of the notion of judgment only after trial.

Moreover, it is submitted, that what we find here is perhaps more harmful where the judge is also the trier of fact than where he is merely presiding over a jury trial. As was stated by the Superior Court in *Commonwealth v. Harrison*, 228 Pa. Superior 412, 323 A.2d 72-24 (1974):

> Although the cases dealing with a trial Judge's conduct generally involve jury trials, the principle they express cannot be limited to jury trials. If anything, it is more compelling in a non-jury trial. If it is ground for a new trial, that a Judge has conducted himself in such a way as might influence the jury to render a decision that is not impartial, it certainly is ground for a new trial when a Judge

> sitting as a jury demonstrates that he is, in fact, not impartial . . . .

After this matter was argued before the Superior Court, the Commonwealth Court decided *Veneziale v. Raudenbush*, ___ Pa. Commonwealth ___, 402 A.2d 295 (1979). At a preliminary injunction hearing before the *same* trial judge, Judge Bodley, sitting as Chancellor in Equity, the Court did not permit cross-examination or allow the defendants to testify. The Commonwealth quickly overruled:

> "Whether or not Appellants' position was 'illegal, unjust and unconscionable,' as the Chancellor found, the Appellants were nevertheless entitled to a fair hearing which encompasses at the very least the right to cross-examine witnesses and present testimony.'" [p. 296]

Moreover, the latitude of a Chancellor, given his broadest equitable powers, exceeds that of a judge sitting without a jury in a civil case.

FEDERAL SECURITIES LAW

Each Federal Land Bank is made up of Associations. Its loans are made through the Associations servicing the territory in which the real estate offered by the applicant is located. These Associations are private cooperatives, owned by the borrowers, who are farmers, ranchers and owners of rural homes. Each Association, and the Southeast Federal Land Bank Association here was no different, solicits, promotes, services and generally provides information relating to the advantages and different aspects of the Farm Credit system.

Although the matter was squarely established by the pleadings, the trial court refused time and again to consider whether the Federal Securities Laws were applicable and no evidence thereon was permitted at trial. The petitioner directly raised the issue of the

applicability of the Federal Securities Laws at every stage of the appellate process. Nevertheless, the appellate courts unaccountably ignored the issue altogether.

Counsel for respondent apparently agreed (in briefs) that the sale of a "security" as understood by the 1933 Act is involved, that the Association/Land Bank is an "issuer" and/or "controlling person" under the Act, and that petitioner is a "purchaser." Stock in the Association, which in turn owns and is supervised by the Land Bank, is issued on the gross amount of the mortgage at the rate of 5% of value—that is, the borrower purchases a $5 share for every $100 borrowed. The argument made by plaintiff's counsel was that respondent was a "federally chartered instrumentality of the United States" and is therefore exempt from the 1933 Act requirements under Section 3(a)(2). That Section reads in part "any security issued or guaranteed by the United States . . . or by any person controlled or supervised by *and* acting as an instrumentality of the Government of the United States . . ." is exempt (emphasis added).

In the first place, it may be readily conceded that the Farm Credit System Act states that the land banks "shall continue as federally chartered instrumentalities of the United States" (12 U.S.C.A. § 2011). Moreover, it is also true that the statute provided that each land bank is subject to the supervision by the Farm Credit Administration, which is an independent agency of the executive branch of the Federal government. That does not settle the question, however.

The Supreme Court has repeatedly held that exemptions from a regulatory statute are to be strictly construed and that the burden of proof rests upon the party who claims the exemption. *Securities and Exchange Commission v. Ralston Purina,* 334 U.S. 37, 44-45 (1948); *Spokane & Inland Empire Railroad*

Company v. United States, 241 U.S. 344, 350 (1916). Furthermore, and most importantly, in determining whether a corporation is entitled to such an exemption, the character of business actually done by the corporation controls, not its name or charter powers. *Bowers v. Lawyers Mortgage Co.,* 285 U.S. 182, 188; *Securities and Exchange Commission v. American International Savings and Loan Association,* 199 F. Supp. 341, 347 (1961).

The issuer in this case is an association that functions as a private cooperative. There was a plethora of information available from deposition that respondent and its agent-owner at every opportunity emphasized the private nature of the system. An interview with Russell Albright that appeared in a magazine was introduced at depositions. A quotation from that article was as follows: "Farmers and land owners still confuse Albright's giant multimillion dollar Farm Credit Service, a private cooperative (owned by its shareholders and borrowers) with the Farm Home Association (FHA), a government-owned agency." (*See* Deposition of Russell Albright, p. 25). Albright admitted in deposition that he told defendant that the lender was a private cooperative and not a governmental entity, and that the United States government did not guarantee the obligations of plaintiff (its bonds, etc.). Moreover, the record will show that not only is plaintiff represented by a private attorney in this suit, but the mortgages and bonds of the Federal Land Bank of Baltimore are prepared by private attorneys as well.

Moreover, it has always been clear (*see* Rule 131 under the 1933 Act and Rule 3b-5 under the 1934 Act) that any part of an obligation issued in the name of a government or governmental instrumentality which is payable from funds generated by a private enterprise is

a non-exempt security within the meaning of the 1933 Act. Thus, Congress in 1970 changed the law specifically to exempt industrial revenue bonds.*

Respondent admitted in deposition that it had never received a specific exemption or opinion from the SEC nor has it ever registered its securities or furnished prospectuses to purchasers in connection with a sale.

But the most important consideration at this point is that petitioner was prevented in discovery and at trial from testing respondent's contention in this regard and from building a record sufficient to prove that the system actually operates as a private entity and therefore its securities are non-exempt. Indeed, a reading of the answers to Interrogatories and the deposition transcript shows that discovery in this area was what respondent feared most.

Petitioner contends that it can be shown that the Farm Credit System has changed drastically from its start

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*In fact, the exemption most nearly in point is that provided by Section 3(a)(5)(A), which refers to securities issued by a ". . . cooperative bank, homestead association, or similar institution . . . ." This Section is important because basic rules of statutory construction do not ordinarily allow for overlapping exemptions—if an issuer falls without an exemption designed for him "but for . . .," he would normally be foreclosed from stating that the relevant test was irrelevant because the exemption was co-opted by another exemption. The Section 3(a)(5)(A) exemption is unavailable because the issuer here takes from the total amount paid or deposited by the purchaser ("by means of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity") an aggregate amount in excess of 3 percent of the face value of security. Simple math will show that this is so: the interest charged on the loan is charged the $5 shares as well (that is, the interest is charged on the total amount of the loan); a pro rata computation over the life of the loan well exceeds three percent.

in 1966, when it was capitalized and tightly scrutinized by the U.S. government, to the essentially private, self-sustaining system that it is today, a more or less standard lending operation that is owned 100% by its borrowers. There is good reason why Congress would make the non-disruptive declaration that the prior federally chartered Land Banks should continue. It is quite another matter to hide behind that designation for Federal Securities Law purposes. Moreover, it is critical to recognize that the class of people who borrow from the Land Banks—farmers and the like—are precisely the type of investors who are entitled to and need the disclosure protection provided by the Federal Securities Laws.

Petitioner's denial here had other repercussions as well. Failure to register and furnish a prospectus are grounds for rescission. But whether or not petitioner is entitled to rely on Section 3(a)(2), that section does *not* exempt any security from the antifraud provisions of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder. But exclusive jurisdiction for Section 10(b) actions rest in the federal courts (1934 Act, Section 27). Consequently, had adequate discovery indicated the applicability of Section 3(a)(2) of the 1933 Act, defendant may have been expected to sue in Federal Court, an avenue that may or may not now be foreclosed by the applicable statute of limitations.

Another antifraud protection is still provided by Sections 12(2) and 17(a) of the 1933 Act, which encourage state court jurisdiction (*see* Section 22(a)). And proof of reliance by defendant upon a false or misleading statement or omission is not necessary to rescind. Counts I and VIII of the Counterclaim state in essence that respondent knew of a material fact, knew it to be material, knew petitioner was ignorant of it and did not

inform him of said fact and may even have conspired with the seller of the property, the title company, the real estate agents, and/or PennDot in keeping the matter from petitioner. The limited discovery permitted suggests strongly that the allegations of Counts I and VIII are true.

The Trial Court cited *Kornicki v. Abrams*, 28 Bucks Co. L. Rep. 215, 218 (1976), for the proposition that a mortgagee has no duty to inspect mortgaged premises for the protection of the mortgagor. What this has to do with the case at hand escapes petitioner altogether. The fraud issue is whether, *knowing* of the easement—knowing of a fact that would have kept petitioner from buying the property and borrowing money from respondent (thereby purchasing a security)—there was a duty to disclose.

CONCLUSION

The issues of due process presented by this case are substantial. The applicability of the Federal Securities Laws is an equally important question. For the reasons set forth, this Petition for Certiorari should be granted.

Respectfully submitted,

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March 6, 1980

APPENDIX

APPENDIX A

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT
OCTOBER TERM, 1978

No. 2096

[Filed: Sept. 14, 1979]

J. 192/1979

FEDERAL LAND BANK OF BALTIMORE,
Appellee,

v.

PHILIP JAY FETNER,
Appellant.

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY, CIVIL ACTION-LAW, AT NO. 77-2577-04

Before: VAN DER VOORT, HESTER and WIEAND, JJ.

OPINION BY VAN DER VOORT, J.

This is an appeal from a decision of the Court of Common Pleas of Bucks County, sitting without a jury, in a mortgage foreclosure actions, in favor of the plaintiff/appellee, Federal Land Bank of Baltimore

(hereinafter, the Bank) and against defendant/appellant, Philip Jay Fetner (hereinafter, appellant or Fetner), in the sum of $137,194.45, plus interest and costs of foreclosure. Counterclaims by the appellant were dismissed. Appellant appeals both from the judgment against him and the dismissal of his Counterclaims.

The Bank's Complaint alleged that on October 9, 1974, Fetner borrowed the sum of $117,500 from it, secured by a mortgage of some twenty-five acres of improved land located in Nockamixon Township, Bucks County. The Complaint alleged that Fetner defaulted on the mortgage by failing to pay some $8,106.36 in monthly installments due from July 1, 1976 to February 1, 1977 and by failing to pay real estate taxes in the amount of $1,659.16. The Complaint recited that as a result of these defaults, the Bank was exercising its right to acceleration under the terms of the mortgage. Judgment was demanded for unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

Fetner filed Preliminary Objections to the Bank's Complaint which were dismissed after briefs were submitted. He then filed a 169-paragraph document which included his Answer, New Matter and numerous Counterclaims. The Counterclaims consisted of eleven counts and sought aggregate damages, compensatory and punitive, in excess of $5,000,000.

The Bank's claim that appellant was in default in his mortgage payments was established by undisputed evidence. In appellant's Answer, he claimed to have made a $2,000 payment for which he was not given credit, but he offered no proof in support of this averment. In any event, this would not have cured the default which has continued since July 1, 1976.

Appellant has averred that the provision for a 10% counsel fee in the mortgage bond is unconscionable. The test of such a fee must be its reasonableness, determined by the circumstances of each case. As this court said in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.*, 196 Pa. Superior Ct. 155, 160, 173 A.2d 703 (1969):

> The mortgagee, having loaned a fixed sum of money should recover both principal and interest without diminution for expenses which he may be forced to pay.

Certainly the circumstances of this case, involving preliminary objections, briefs, depositions, a trial and this appeal, each involving many of the issues tendered by the appellant in his Counterclaims make a fee of 10% of the mortgage quite reasonable, and probably not fully compensatory for the Bank's legal expenses. There was no other challenge to the amount of the judgment on foreclosure.

There remain for consideration the many issues raised in appellant's Counterclaims. Counterclaims are limited by Rule 1148 of the Pa. R.C.P. to those "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose". The Counterclaim must have been a part of or incident to the creation of the mortgage itself, and this is to be read narrowly. *Mellon Bank N.A. v. Joseph*, ___ Pa. Superior Ct. ___, ___ A.2d ___ (June 27, 1979).

So tested, those which met the requirement of the rule amounted to averments that the Bank was guilty of fraud in the inducement of the mortgage. Averments in support of this claim of fraud were: (1) that Penn DOT had obtained an easement over a portion of the mortgaged property which was not disclosed to the appellant

at or before the time of closing; (2) that appellant had been promised 80% mortgage financing which he did not receive; and (3) that appellant had been promised "lenient" treatment if he fell behind in his payments, but foreclosure followed a second default.

The background from which these allegations emerge is the negotiation between the appellant and Russell Albright, the local manager of the New Britain Branch of the Southeast Association, an organization which procured loan applications for submission to the Bank. Appellant testified that he told Albright that he had located a "gentleman's country estate and horse farm" on which he planned to sign an agreement to purchase in June, 1974. The purchase price was to be $180,000 and appellant requested 80% financing. Albright is said to have replied that he would recommend such a loan and that his recommendations had not been turned down by the Bank as yet. He did not say that he had authority to approve the loan.

At or about the same time, appellant, who is a lawyer, authorized a title search and in due course a preliminary title report was delivered to Albright which did not show the easement to Penn DOT. It was created at a later date and place on record on October 1, 1974.

The closing took place on October 9, 1974 at which time the appellant executed the bond and mortgage in favor of the Bank as security for a loan of $117,000, the maximum the Bank would lend. He signed the documents and received the proceeds at that time. A final title report was on hand at the time of the closing which showed the Penn DOT easement. This would appear to have been available to all parties at the closing, including the appellant, but it does not appear that he

read it. There is no evidence that he did not understand the terms of the bond and mortgage.

In November, 1974, appellant lost his job and fell behind in his mortgage payments. The Bank threatened foreclosure but did not do so, and by March 1976 appellant became current in his payments. However, he did not pay the 1975-1976 school taxes on the property, and the Bank did so pursuant to authority vested in it under the terms of the mortgage. Appellant again fell behind in his monthly payments on July 1, 1976, and has made no payments since that date, although he has continued to occupy the property.

Attached to the appellant's Counterclaims were copies of Complaints filed against the sellers of the property, the estate of his real estate broker, two title insurance companies and Penn DOT, averring misrepresentations and fraud in the sale of the property, most of which are repeated in his Counterclaim against the Bank.

We deal first with the appellant's claim that the Bank fraudulently withheld from him knowledge of the fact that Penn DOT had obtained an easement over a portion of the property nine days before the closing. At the time appellant talked to Albright, the preliminary title report, which was then available, did not include the easement because it had then not been created. Appellant does not claim that the Bank or Albright reported to him that no easement existed; he simply contends that the Bank had a duty to tell him that the title report showed an easement in Penn DOT.

There is no basis for appellant's conclusion that the Bank or its mortgage procuring agent had any duty to search out defects in the title and disclose them to the appellant. Ordinarily, the relationship between the borrower and lender does not create a confidential

relationship, *Grace et ux v. Moll,* 285 Pa. 353, 355, 132 A. 171 (1926), and none was shown to exist in this case.

An action based upon concealment will not lie, even as between a vendor and vendee, unless there is established an affirmative duty to disclose the existence of a title defect. *American Metal Fabricators Company v. Goldman,* 227 Pa. Superior Ct., 284, 289, 323 A.2d 891 (1974).

Ordinarily, there is no duty on the part of a lender to inspect the mortgaged property to determine that the borrower is obtaining that which he may have been promised by the vendor or that which he believes he is obtaining. Unless some further obligation is assumed, the lender's inspection of the premises to be mortgaged is made only to ascertain whether the property has sufficient value to secure the loan and is made by the lender for its benefit only.

Appellant did not contract with the Bank to review the title; he did not advise the Bank that he intended to rely on its inspection of the property; and no duty existed in law for the Bank to learn of or disclose any matter which appellant might deem a defect. If appellant was defrauded by the Penn DOT easement of which he avers he was unaware, the deception was not perpetrated by the Bank and appellant's remedy must be sought elsewhere.

It is equally clear that appellant was not defrauded by the representation of the Bank's agent that it would recommend 80% financing. Albright's assurance that he would recommend a mortgage in that amount and that his recommendations had never been turned down were no more than the opinion of an agent admittedly acting outside his authority. His power, at best, was only

sufficient to allow him to recommend a loan to the Bank. See 12 U.S.C.A., § 2033(11). The Bank had the absolute right to refuse the mortgage terms requested by the appellant and recommended by its agent. *Todd v. Skelly,* 384 Pa. 423, 428, 120 A.2d 906 (1956). Appellant had a remedy for the denial of his original application which he did not exercise. 12 U.S.C.A. § 2202. Finally, appellant voluntarily accepted the lesser 60% financing offered by the Bank, took its mortgage money and signed the bond and mortgage. Certainly, these circumstances do not establish fraud in the inducement of the mortgage.

The claim that appellant was promised "lenient" treatment in the event of a default is based upon a statement attributed to Albright in the preliminary negotiations to the effect that the Bank had a reputation for being lenient with its lenders. Even if Albright had the authority to commit the Bank, which he did not, this hardly amounted to a commitment that the Bank would not pursue its legal remedies if there was a default. In point of fact, the Bank did not foreclose when appellant went into default for the first time in 1975. It was not until appellant again fell behind in July 1976 and made no payment from then until March 1977 that the Bank foreclosed. There is no basis in fact or law for appellant's claim that he was entitled to leniency and did not receive it.

The remaining Counterclaims were either unsupported by any proffer of evidence, or related to transactions or occurrences which were not part of or incident to the mortgage loan, and therefore properly excluded from consideration by reason of Rule 1148 of the Pa. R.C.P. If any of them are actionable, it must be in an action not tied to this foreclosure as a Counterclaim.

Finally, appellant claims that he was denied the right to make a final argument. The extent to which final argument may be permitted in a civil case is addressed to the discretion of the trial judge. *Commonwealth, ex rel. Frieldman v. Friedman*, 223 Pa. Superior Ct. 66, 71, 297 A.2d 158 (1972). We said in *Friedman* (at p. 71), and it is equally appropriate here:

> " 'A matter such as the length of argument is, of course, almost entirely within the discretion of trial courts . . . .' Here, an experienced trial judge, thoroughly familiar with the law governing the case, concluded that he had heard sufficient argument on the facts during the course of the hearing and any further argument would only be repetitious . . . .
>
> " '. . . and we will not interfere with the discretion of the Court in the matter . . . .' "

In the instant case, the trial court received and considered extensive briefs at the time the Preliminary Objections were ruled upon, and he permitted, indeed encouraged, discussion of the issues by counsel as the trial progressed. If, in his judgment, he had heard enough, we will not interfere.

Affirmed.

APPENDIX B

COMMONWEALTH COURT OF PENNSYLVANIA

June 6, 1979

L. JOAN VENEZIALE, *et al.*,
Appellants,

v.

CHARLES RAUDENBUSH, JR.
and
HARRY ZAMBELLI,
Appellees.

James M. McMaster, Thomas E. Timby & Associates, Newtown, on briefs, for appellants.

Daniel Lawler, Feasterville, on briefs, for appellees.

Before BLATT, DiSALLE and MacPHAIL, JJ.

MacPHAIL, Judge.

On May 12, 1978, Appellants L. Joan Veneziale, Walter Holzworth, Rosemarie Curran, and Michael J. Laputka were enjoined by the Court of Common Pleas of Bucks County from denying to Charles Raudenbush, Jr. and Harry Zambelli, the duly elected township supervisors of Lower Southampton Township, access to the township building and the records, books and files of the township. While Appellants have raised seven issues for our determination, we need address only one.

Pa. R.C.P. No. 1531 authorizes the issuance of a preliminary injunction only after written notice and *hearing* unless immediate and irreparable harm is shown in which event a *hearing* must be held within five days of the issuance of the injunction. In the instant case the court issued the preliminary injunction after written notice and hearing. However, Appellants claim that they were denied their due process rights at the hearing because they were not permitted to cross-examine witnesses nor were they permitted to present testimony. Our reading of the record discloses that indeed the Chancellor did interrupt and prohibit cross-examination by the Appellants and did not permit Appellants to offer testimony on their own behalf.

In his opinion in support of the preliminary injunction the Chancellor characterized the Appellants' contention that they were denied their due process rights as "utterly without merit." We disagree. Whether or not Appellants' position was "illegal, unjust and unconscionable," as the Chancellor found, the Appellants were nevertheless entitled to a fair hearing which encompasses at the very least the right to cross-examine witnesses and present testimony. In *Pubusky v. D.M.F., Inc.*, 428 Pa. 461, 463, 239 A.2d 335, 337 (1968), under nearly identical facts, Justice (now Chief Justice) Eagen wrote:

> "While the testimony at a hearing for a preliminary injunction which seeks only to preserve the status of the parties until the issue is finally determined need not always be as extensive as that at a final hearing, the litigants should not be deprived of their right to fully cross-examine all adverse witnesses, nor of the opportunity to present testimony which is relevant to the question of whether or not the injunction should issue."

Accordingly, the decree granting the preliminary injunction in the instant case must be vacated.

ORDER

AND NOW, this 6th day of June, 1979, the decree entered May 12, 1978 by the Court of Common Pleas of Bucks County granting the preliminary injunction requested by Charles Raudenbush, Jr. and Harry Zambelli is vacated and the case remanded to the Court of Common Pleas of Bucks County for further proceedings.

Supreme Court, U. S.
FILED
APR 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

v.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO TO THE SUPERIOR COURT OF PENNSYLVANIA

PAUL R. BECKERT, JR.
JACKSON, SULLIVAN & BECKERT
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IN THE
COURT OF COMMON PLEAS
OF BUCKS COUNTY

Civil No. 77-2577-04

Mortgage Foreclosure

FEDERAL LAND BANK OF BALTIMORE

v.

PHILIP JAY FETNER

OPINION

In this mortgage foreclosure action, defendant has appealed to the Superior Court from our entry of a Decision, after trial without jury, in favor of plaintiff and against defendant in the sum of $137,195.45, together with interest and costs of foreclosure, and from our dismissal of defendant's Exceptions thereto.

In its complaint plaintiff alleges a straightforward real estate transaction under which defendant borrowed from plaintiff the sum of $117,500.00 secured by a mortgage upon some twenty five acres, with improvements erected thereon, some twenty five acres, with improvements erected thereon, located in Nockamixon Township, this County. Alleging default in payment of monthly installments from July 1, 1976 to February 1, 1977, totalling $8,106.36, and further alleging defendant's failure to pay real estate taxes in the sum of $1,659.16, plaintiff exercised its right of acceleration under the terms of the mortgage and demanded judgment for the unmatured principal, monthly installments

due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

In a prolix Answer, New Matter and Counterclaim, defendant, inter alia, denied that the instrument sued upon "is a mortgage", denied having defaulted, denied that real estate taxes were due "under the terms of the mortgage" and alleged "that after reasonable investigation", defendant had been unable to gain sufficient knowledge from which to form a belief as to the truth of the averment that the amount claimed was due plaintiff.

Defendant's New Matter and Counterclaim contain 169 paragraphs. In New Matter defendant alleges that Federal Land Bank of Baltimore does business within the Commonwealth of Pennsylvania and is in violation of the registration requirements imposed upon foreign corporations under 15 P.S. 2014. He challeges the attorney's fee of 10% provided for in the agreement, alleging that it is excessive. He acknowledges that he had made a long-term "residence home loan". And, finally, he incorporates by reference an Amended Complaint in a non-related action brought by defendant against his grantors, Dr. Stewart Haggerty and Martha Haggerty, his wife, Commonwealth Land Title Insurance Company, and Doylestown Title and Abstract Co., Inc., which companies issued title insurance at the time of his purchase on October 9, 1974, the Estate of Elizabeth James, deceased, who had traded as Elizabeth James Country Real Estate and was the realtor who handled the sale and assisted in securing the mortgage loan, and the Commonwealth of Pennsylvania, Department of Transportation, condemnor of an easement over the land.

In Count I of his counterclaim against plaintiff defendant, an attorney-at-law, then incorporated by reference the substance of his Answer and New Matter

and alleges, in substance, that plaintiff fraudulently concealed from him its knowledge of an easement granted Penndot prior to his settlement. He thereupon claimed damages from plaintiff "in excess of the sum of $250,000.00 or in the alternative $180,000.00, and in addition thereton punitive damages in the sum of $500,000.00, together with costs of suit and legal interest". Ten more counts follow.

Count II alleges that for some time past defendant had "repeatedly questioned" the accuracy of statements of his account received from plaintiff, alleged that statements had been sent "too late to pay the amount owed or some time not at all", claimed that defendant had repeatedly asked plaintiff to discuss discrepancies but that such requests had been refused by plaintiff, and alleged that he therefore was unable to determine "what amounts if any are due". Defendant then alleged that "it is clear that plaintiff has acted in bad faith in its dealings with him" in order "to create a delinquency and force a foreclosure so as to avoid and moot the litigation regarding the purchase of the property, in which plaintiff was fraudulently involved".

Defendant asserts that plainstiff's "actions" (presumably its alleged mailing of statements and refusal to discuss the account with defendant) were "intentional, wilfull and malicious, and done, in part, for the purpose of forcing defendant out of said property". These actions of plaintiff, defendant claims, cost him "substantion time, numerous legal fees and expense, great aggravation, . . . possible loss of property", and "extensive credit problems" which led him to demand, in Count II, compensatory damages of $200,000.00 and puntive damages of $500,000.00.

Here it would be appropriate to refer to the litigation in which defendant herein seeks recovery against his grantors, the title insurance companies, the realtor, and the Commonwealth. In essence plaintiff therein avers that the realtor served as an agent for him in his search for "a suitable and secluded gentleman's country estate and horse farm in the Bucks County area" and had prior to the execution of the agreement of sale with the grantors on June 5, 1974, informed the defendant that the many trees, shrubs and planting on the property, setting the natural boundaries thereof, gave it that "certain beauty, unique privacy and distinct character" which was "especially suitable for the gentleman's country estate and horse farm" that the defendant was looking for. Then, alleging the execution of the agreement of sale with the grantors, defendant alleges that he sought title insurance through the title company defendants, and secured a preliminary title report from them on June 10, 1974. He then alleges that thereafter, on July 29, 1974, and subsequent to the execution of the agreement of sale, his grantors "covertly and in contravention of the terms of the agreement", executed a deed of easement which conveyed to the Commonwealth of Pennsylvania, Department of Transportation more than 7,000 square feet of land covered by trees and shrubs, a part of the natural boundary of the property. He went on to aver that the deceased realtor had represented to him that no highway expansion was planned on or near the property and that relying upon the alleged misrepresentation of the deceased realtor he took possession of the property only to learn thereafter that a planned expansion by PennDOT was well known to area residents prior to the execution of the agreement. Defendant concluded that his grantors thus acted fraudulently.

Defendant, in that action, went on to allege that prior to his settlement on October 9, 1974 the defendant title insurance companies issued its policy of insurance without reference to the deed of easement referred to above which, he averred, had been recorded on October 1, 1974. He termed the title companies "grossly negligent", the grantors the "perpretrators of fraud", the Commonwealth as "co-conspirators" with the grantors as well as "trespassers" who maliciously destroyed certain trees on the property "and consequently severely altered the character of the property and thereby greatly reduced the value thereof".

Defendant sought by way of Count I of the collateral action against his grantors and others (a) compensatory damages in the sum of $180,000.00 (the purchase price of the property), plus all interest thereon paid by defendant plus costs and expenses incurred by him in connection with his intended rescission of the agreement, (b) the sum of $50,000.00 for reimbursement for alleged improvements made by this defendant to the property and (c) punitive damages in the sum of $500,000.00 for "gross, wilfull, wanton, malicious and fraudulent misrepresentation [of his grantors, *et al.*] which have irreparable damaged plaintiff". Alternatively in Count I of the collateral action, this defendant sought damages in excess of $150,000.00 which allegedly represented "the true replacement value of the destroyed trees, shrubs and plantings" and punitive damages in the sum of $500,000.00 for those defendants' alleged gross, wilfull, wanton and malicious and fraudulent misrepresentations.

Count II of this defendant's said complaint incorporates by reference a substantial portion of Count I within it and seeks damages from the defendant title

insurance companies in a sum in excess of $100,000.00 for breach of contract in failing to discover the deed of easement allegedly conveyed to his grantors by PennDOT and allegedly recorded October 1, 1974.

Now, we return to the present action. Count III incorporates into this unusual mortgage foreclosure another dimension and, of course, incorporates by reference much of the Answer, New Matter and Counterclaim which preceded and followed those allegations in Count III. Here defendant states that in November 1974, "as a result of exposing corporate overseas bribery and a dispute with his [defendant's] employer, defendant was forced to leave his position as a result of a dispute with his employer", which left him without a regular source of income. It is then alleged that upon being informed by defendant of these problems, plaintiff had told him it would, if necessary, give him the time needed to establish his "income flow" and thereupon defendant relied upon such assurances and made further improvements to the property as well as "substantial investments in new business ventures".

He then complains in Count III of his counterclaim that although late in making his July 1975 payment he had requested that plaintiff not release information concerning the overdue nature of the account and, as well, requested that "all communications with Defendant in *Fetner v. Haggerty, et al.* be very circumspect".

Plaintiff agreed, according to defendant, but notwithstanding such agreement had disclosed to a prospective lender from whom defendant sought short-term financing that the mortgage payments were indeed three months overdue and that it was considering some type of legal action. As a consequence, said defendant, "all financing fell through" and moreover his grantors' attorney learned

that foreclosure proceedings were imminent as a result of which "all serious settlement discussions were terminated by them." Concluding that such alleged disclosures made by plaintiff were in violation of the Federal and Pennsylvania Truth in Lending Act and Fair Disclosure of Credit Act, and "related statutory provisions", in violation of a duty owed by plaintiff to defendant and in violation of "agreements and understandings" made between plaintiff and defendant, defendant alleged that plaintiff's actions were for the purpose of forcing a foreclosure in order to render moot and conceal the "original fraud". For this behavior as well as for his loss of credit, "economic losses relating to his profession", etc., defendant demanded judgment of the additional sum of $275,000.00 against his mortgagee by way of compensatory damages, and $700,000.00 in punitive damages.

Count IV relates to matters preceding the mortgage commitment and at settlement. Specifically defendant complains that plaintiff did not afford him with 80% financing which he had allegedly been told was available, but instead offered him 60% financing which due to the pressure of time, he alleges, he was obliged to accept, all to his detriment. He also complains of plaintiff's requirement concerning secondary financing. Alleging that plaintiff's representation concerning interest rates and representations concerning separate secondary financing were false and fraudulent and made "with the intent to deceive and defraud defendant and to induce him to obligate himself to plaintiff for mortgage financing", defendant in this Count demands judgment of $50,000.00 in compensatory damages.

In Count V of the counterclaim defendant asserts that both in 1975 and 1976 plaintiff, without advance notice

to defendant, paid school taxes due upon the mortgaged real estate and then demanded reimbursement for the sums paid together with interest all the while knowing of defendant's "cash flow problems". These school tax payments made by plaintiff, according to defendant, were made in order that there might be justification to foreclose and deprive defendant of the property and to "moot and conceal the original fraud by plaintiff". Accordingly, defendant demanded $100,000.00 in compensatory damages and $500,000.00 in punitive damages.

In Count VI defendant avers that he is a "good, honest and virtuous citizen who was an esteemed member of the community in credit and reputation". Alleging that plaintiff's "actions" injured his good name, fame and reputation resulting in his loss of credit, economic harm, humiliation, embarrassment, aggravation, etc., defendant demands judgment of $400,000.00 in compensatory damages, together with $700,000.00 punitive damages.

Count VII alleges that certain provisions in the mortgage which he had signed were "unconscionable, illegal and/or unenforceable" and were inserted in the mortgage, as defendant sees it, with some malicious intent, thus entitling him to judgment against plaintiff in the sum of $50,000.00, compensatory damages and $500,000.00 in punitive damages.

In Count VIII defendant expressed the belief that plaintiff, prior to settlement had in its possession a survey of the property and a preliminary title report which it failed to reveal to him in breach of a duty owing him. And alleging that such behavior on the part of plaintiff, his mortgagee, was intentional and malicious, designed to cause him substantial harm, defendant asks this Court to award him the sum of

$250,000,00 compensatory damages and $500,000,00 punitive damages.

Count IX states that on August 10, 1976 defendant sent plaintiff a check in the amount of $2,000.00 which had not been credited to his account and avers that plaintiff refused to check its records to determine whether such payment had been received, as a result of which defendant was forced to spend time and legal fees, with the further result that he suffered losses in time from his business and loss of credit. Since this behavior on the part of plaintiff was also averred to have been intentional, malicious and wanton and to create a foreclosure posture, defendant asked for judgment of $50,000.00 compensatory damages and $250,000.00 punitive damages.

In Count X of his counterclaim defendant complains, in essence, that although it had been represented to him that plaintiff had a very lenient attitude in the event "any payment problems would arise", nonetheless when defendant's "cash flow problems" presented themselves, plaintiff went ahead with its foreclosure action. Defendant recites at great length the efforts that he had made to forestall foreclosure and charges plaintiff with having acted fraudulently and the the malicious intent to "moot the question of the original fraud", all to his great damage. Wherefore he claimed once more of plaintiff the sum of $200,000.00 in compensation and $1,000,000.00 in punitive damages.

Finally, in Count XI, after incorporating paragraphs, one through one-hundred seventy of the Answer, New Matter and Counterclaim (Count XI is initiated with paragraph 171) defendant charges plaintiff with having violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. He

further charges the plaintiff's failure to inform him of the existence of an easement across the property, financed by plaintiff for defendant, was a fraudulent omission of a material fact contrary to the 1934 Act. The prayer for relief under Count XI calls for the "rescission of the entire loan transaction, refund of all interest paid, and damages in the amount of $500,000.00 both pecuniary and punitive . . . ."

So that it might not be thought that the writer of this opinion may be guilty of that prolixity which he finds in defendant's Answer, New Matter and Counterclaim, let it be said that he deemed it necessary to outline defendant's pleadings in as succinct a fashion as possible (under the circumstances) in order that the Superior Court might better understand the events which took place at the trial of the matter and which are here submitted for scrutiny.

The Superior Court may be asked to review the total of forty-six Exceptions filed to the proceedings in all of its aspects. Defendant has not favored us with a statement of the precise matters complained of but we shall assume that he will brief and argue all issues excepted to. We shall address but a few of them and even these which we mention, in our opinion, are without merit on their face. It should be added, gratuitously, that had plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith. That was not done. Hearing was scheduled and held.

The record will reveal that two witnesses were offered by plaintiff through whom the mortgage bond, and so-called real estate mortgage bond were introduced and received in evidence. Testimony established that the Federal Land Bank was chartered under an Act of Congress in 1916 and under the Farm Credit Act of

1971. It receives no Federal funds from the government and exists in order to make mortgage loans to farmers.

A "statement of debts" of this defendant was also received into evidence which reflected that his total debt as of February 15, 1978 (the date of hearing) including unmatured principal of $112,600.00, various installments due, tax insurance advances, fire insurance advances, interest to October 14, 1978 and attorney's commission, totalled $147,906.97.[1] The last payment made by this defendant upon his mortgage obligation was July 6, 1976, one year and seven months prior to the hearing. He has remained a resident of this "gentleman's farm" throughout this period of default. During cross-examination of plaintiff's witnesses, defense counsel made numerous effort to inquire into all manner of matters not germane to the foreclosure question (See e.g., N.T. pp. 42-46). This was not permitted.

After plaintiff rested its case defendant called an agent of the plaintiff who dealt with defendant when he sought the mortgage loan. In connection with counsel's examination of this witness the hearing judge, for the first of many times thereafter during the long day, suggested to defense counsel that having alleged fraud in various manners on the part of plaintiff, he should set about proving it. (N.T. p. 52). Objection after objection was sustained by the trial judge to questions which went neither to plaintiff's right to foreclose nor to the alleged fraud. (See e.g., N.T. pp. 99 through 112). At that point further examination of plaintiff's agent was denied defense counsel. Of this defendant complains. We shall respond to that complaint merely with a suggestion that a review of counsel's examination of the witness will amply justify the Court's action.

---

[1] "Our decision erroneously stated $137,195.45, the amount originally claimed".

Thereafter the defendant testified. He was given great latitude. Once again, after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the alleged fraud if indeed it existed. No evidence was forthcoming and we are satisfied that none existed. The extravagant representations made by this defendent in his lengthy Answer, New Matter and Counterclaim speak for themselves. The defendant was given every opportunity to testify to facts which arguably might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has any other borrower; that is to say, an interest other than that of having sufficient security for the loan it advanced and an interest in having its contractural payments made when due.

Accordingly, the Court refused to hear further testimony from the defendant, being satisfied that the testimony offered was as lacking in merit, and at times in credibility, as was the defendant's pleading. Few reported cases discuss defenses and counterclaims in mortgage foreclosure actions. Certainly, payment, fraud in the inducement, want of consideration, release, setoff, and denial of execution of the mortgage, may be pleaded by way of defense in answer to a complaint in foreclosure. P.L.E. Mortgages, Section 225. On the issue of fraud, Section 225 states:

> "If defendant intends to insist on a fraud in fact, it is not sufficient to allege in the answer facts from which an inference of fraud may be drawn. Fraud must be charged distinctly".

Counterclaims in foreclosure actions are governed by Pa. R.C.P. 1148 which states:

> "A defendant may plead a counterclaim which arises from the same transaction or occurrences or series of transactions or occurrences from which plaintiff's cause of action arose".

According to 3A Anderson, Pa. Civ. Prac. Section 1048.4 and 1048.5, a defendant may properly counterclaim for damages for breach of warranty of title, or for any unliquidated claim which the parties had agreed to adjust when the mortgage came due, but, defendant may not counterclaim for unliquidated damages from torts unrelated to the mortgage action. In briefing the question counsel have referred us to very few cases which speak to the specific matters before us. In *First Federal Savings and Loan Association v. Street Road Shopping Center Inc.,* 68 D. & C. 2d 751 (Bucks 1975), affirmed 238 Pa. Superior Ct. 770 (1975), it was held that a mortgagee does not waive its right to foreclose by accepting late payments. It was further held that in that case a 5% attorney's fee was reasonable where the debt exceeded $300,000.00. In *Kornicki v. Abrams,* 28 Bucks Co. L. Rep. 215 (1976), it was held that a mortgagee is under no duty to inspect the premises to be mortgaged.

On the issue of taxes, counsel for plaintiff has referred us to *Pennsylvania Trust Co. v. Earnest,* 128 Pa. Superior Ct. 331 (1937), wherein it was held that it is proper for a mortgagee to pay taxes when they become delinquent. Unfortunately, on the issue of fraud, counsel have referred us to no mortgage foreclosure case dealing with factual averments which are even vaguely similar to the one at hand and none have been found. No doubt none exist nor will hereafter arise.

We believe that the 10% allotted for counsel fees is appropriate in this case. Such fees have been previously allowed. See *Plum Tree Inc. v. Seligson,* 224 Pa. Superior

Ct. 471 (1973); *Mack v. Fennell,* 195 Pa. Superior Ct. 501 (1961). Such attorney's fees are properly includable in a judgment and belong to a plaintiff. *Commonwealth v. Pennsylvania Loan Corp.,* 127 Pa. Superior Ct. 253, 256 (1937). True, such fees must be reasonable. However, reasonableness must be determined by the circumstances of each case as stated in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.,* 196 Pa. Superior Ct. 155, 160 (1961), at page 160:

> "The mortgagee, having loaned a fixed sum of money should recover both principal and interest without diminution for expenses which he might be forced to pay."

The extent of services rendered by counsel in this case, given the fact that the complaint was filed on March 16, 1977, given the fact that defendant chose to file his meritless Answer, New Matter and Counterclaim, take lengthy depositions thereon, demand trial in an effort to forestall foreclosure, and given the fact that counsel was obliged to engage in lengthy preparation for trial, as well as spend a day on trial, satisfies us that the counsel fee allowed is reasonable under the circumstances. It should be added, obviously, that defendant has now appealed to the Superior Court. In this connection counsel is called upon to brief and argue plaintiff's position before that Court, thus leading to substantial additional expense to plaintiff for counsel fees.

In brief, it is the writer's judgment that this defendant has acted in bad faith from the inception of the mortgage foreclosure action. Since July 1, 1976 to date, as was acknowledged on July 25, 1978, defendant has continued to enjoy residence and conduct a business at the foreclosed real estate, while plaintiff-mortgagee continues to advance funds for the payment of real estate

taxes, and necessary insurance. He has not pleaded a valid defense to the foreclosure action and has not proved one. While having pleaded fraud at great length in his New Matter and Counterclaim, it is quite obvious that there is no substance in the same.

For these reasons we entered judgment against defendant.

BY THE COURT:

/s/ F. F. Bodley
Judge

September 8, 1978

Supreme Court, U. S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

vs.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION

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APPENDIX

Appendix A -- Opinion of the Court of Common Pleas of Bucks County 1a

In The

Supreme Court of the United States

October Term, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

vs.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION

This brief is submitted on behalf of respondent Federal Land Bank of Baltimore (hereinafter "the Bank"), in opposition to the petition for a writ of certiorari to the Superior Court of Pennsylvania filed by petitioner Philip Jay Fetner (hereinafter "Fetner").

INTRODUCTION

This is a simple action involving a long-standing default in a routine residential mortgage which is controlled by well-settled principles of state law, in defense of which Fetner interposed various irrelevant and unrelated allegations below; there is no basis for issuance of a writ of certiorari in this case.

The petition presents no special or important reason why the writ should be granted. Supreme Court Rule 19(1).

There is no conflict between the decisions of any courts of appeals involved in this case.

This case does not present a substantial or important question of federal law which has not been, but should be, decided by this Court.

This case does not present any question of conflict with any applicable decision of this Court.

The decision rendered below by the Pennsylvania Superior Court rests upon adequate state grounds.

OPINIONS BELOW

Petitioner Fetner states in his petition that the opinions of the Superior Court of Pennsylvania and of the Court of Common Pleas of Bucks County, Pennsylvania are reprinted in the appendix to his petition. However, he has failed to include the latter, which is therefore reprinted in Appendix A to this brief.

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Superior Court of Pennsylvania properly hold that the trial court did not abuse its discretion in the conduct of the trial of this mortgage foreclosure action?

2. Did the Superior Court of Pennsylvania properly hold that the trial court was correct in dismissing those counterclaims to the mortgage foreclosure action which were based upon the Federal Securities Act of 1933 and the Securities Exchange Act of 1934?

COUNTERSTATEMENT OF THE CASE

This matter is before your Honorable Court due to petitioner Fetner's request for review of the decision of the Pennsylvania Superior Court at No. 2096 October Term, 1978, filed September 14, 1979, which affirmed the July 6, 1978 judgment of the Court of Common Pleas of Bucks County, Pennsylvania, sitting without a jury, in a mortgage foreclosure action.

The procedural history is that the Bank commenced an action in the Court of Common Pleas of Bucks County, Pennsylvania in Mortgage Foreclosure by Complaint filed on March 16, 1977 against Fetner. The Bank's complaint alleged that in October 1974, Fetner had borrowed the sum of $117,500 from it, secured by a mortgage upon some twenty-five acres located in Nockamixon Township, Bucks County, Pennsylvania. The complaint further alleged that Fetner had defaulted on the mortgage by failing to pay some $8,106.38 in monthly installments due (in accordance with the mortgage bond) from July 1, 1976 to February 1, 1977, and by failing to pay real estate taxes in the amount of $1,659.16. The Bank's complaint recited that as a result of the preceding it was exercising its right to acceleration under the terms of the mortgage. Judgment was demanded and was entered after trial for unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission totalling $137,195.45.

The record below discloses that Fetner wished to purchase a "gentleman's country estate and horse farm," and that he met with the local manager of the New Britain Branch of the Southeast Federal Land Bank Association, Mr. Albright, to

request financing in June of 1974. He told Albright that he planned to pay $180,000 for the country estate and that he wanted 80% financing. Fetner signed an agreement of sale with the owners of the property that contained a 75% mortgage contingency. Prior to settlement, the Bank approved approximately $110,000 in net financing and limited secondary financing to $35,000. Meanwhile, Fetner ordered title insurance from a title company and received a preliminary title report that did not show an easement to the Pennsylvania Department of Transportation (PennDOT) which was *later* created and placed of record on October 1, 1974. At settlement on October 9, 1974, a final title report was on hand that showed the easement.

Fetner, who is an attorney, purchased the property and accepted and executed a mortgage of some $117,000. There is no dispute that he signed the documents or that he received the proceeds. At the time that he did so it appears that he had the final title report showing the PennDOT easement; there is no evidence of record that he did not understand the amount or the terms of the mortgage or that he thought he was signing something else when he signed the documents. There was also no evidence that the Bank had any involvement in the creation of the PennDOT easement.

In November of 1974, Fetner left his job and fell behind in his payments on the mortgage. The Bank threatened foreclosure, but ultimately did not foreclose. In March 1976, Fetner became current. In the meantime, he had not paid the real estate taxes; the Bank paid 1975 and 1976 taxes pursuant to its ability to do so under the mortgage. In July of 1976, Fetner again fell behind in his payments. ***He has not made any payments on the mortgage since.*** (His pleadings claimed that he made a $2,000 payment in October or November of 1976; however, he produced no evidence of such payment at trial.) In March of 1977, the Bank filed the aforesaid simple action in mortgage foreclosure, consisting of ten paragraphs. Fetner responded by first filing preliminary objections and then by filing a 169 paragraph answer, new matter and counterclaim. The

counterclaim contained eleven counts and demanded, in the aggregate, $2,250,000 in compensatory damages and $5,150,000 in punitive damages.

The answer filed by Fetner first denied that the document was "a mortgage." Review of that document reveals that it quite clearly has every attribute of a rather ordinary real estate mortgage (*see* R12a, 747a). Secondly, Fetner's answer denied that he had "defaulted." However, he produced no evidence at trial tending to show that he had made any payment subsequent to July 1, 1976. The Bank, on the other hand, produced evidence that he had not paid any of the unpaid amount.

The opinion of the Bucks County Court of Common Pleas, Bodley, J., dated September 8, 1978 sets forth the nature of the new matter and of the counterclaim filed by Fetner concisely and completely. Reduced from 169 paragraphs to the simplest of terms, Fetner's $7,400,000 counterclaim to a $137,195 action in mortgage foreclosure consisted of three claims: (a) that the Bank breached an alleged duty to him by not disclosing on October 9, 1974 that PennDOT had obtained an easement on the property on October 1, 1974 (he also claimed that his nondisclosure was a fraudulent omission of material fact contrary to the Securities Exchange Act of 1934); and (2) that the Bank represented to him that it would provide 80% financing and certain secondary financing limits but that it instead offered 60% financing and a lower secondary financing limit (which Fetner accepted); and (3) that it would be "lenient" if he fell behind in payments but that it foreclosed when Fetner became in arrears a second time.

Discovery consisted of three sets of interrogatories propounded by Fetner and of the depositions of two persons, taken by Fetner and by his counsel. At the non-jury trial, the Bank called two witnesses, through whom it intoduced the mortgage, mortgage bond and real estate mortgage bond, and established that the total debt as of February 15, 1978 (with interest to October 14, 1978) was $147,906.97, that Fetner's last

payment was made on July 6, 1976, and that he remained in possession of the premises through the date of the hearing without making *any* further payments.

Fetner also called two witnesses at trial, including an agent of the Bank, as on cross, and Fetner himself. Throughout the trial, counsel for Fetner sought to ask questions which related neither to the Bank's right to foreclose nor to the allegations of fraud in the inducement. The trial court limited the testimony to evidence tending to show a defense to nonpayment after July 1, 1976 or to those counterclaims which *arose from* the mortgage transaction. With respect to both his witnesses, Fetner was given repeated opportunity throughout the trial to present relevant evidence concerning the above points. When such evidence was not offered after the lower court repeatedly asked if such evidence could be produced, testimony of the witnesses was deemed concluded.

The Bank's first witness at the hearing held on February 15, 1978 was Richard S. Carpenter. On cross-examination, the trial judge ruled that a number of questions asked by counsel for the defendant were beyond the scope of the direct testimony (R595a). The following occurred at the conclusion of the cross-examination (R596a-597a):

"BY MR. BECKERT:

Q. Are you familiar with the papers that are signed by a prospective borrower prior to and up to settlement that are furnished by the Federal Land Bank of Baltimore?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained.

BY MR. BECKERT:

Q. Are you aware of any documents that any borrower receives?

THE COURT: Mr. Beckert, won't you confine yourself to the direct examination.

If you wish to call the witness as your own—I understand you subpoenaed him—you may.

BY MR. BECKERT:

Q. How would any borrower know that the Federal Land Bank of Baltimore is a Federal instrumentality?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained. You need not answer the question. Is there anything else?

MR. BECKERT: Your Honor, could you give me just a moment?

THE COURT: Yes.

* * *

BY MR. BECKERT:

Q. Has the Federal Land Bank of Baltimore ever applied to be incorporated in the State of Maryland?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained.

MR. BECKERT: I have no further questions.

* * *

(Witness excused.)"

The Bank's second witness was John R. Wright, manager of data services for the Bank. Mr. Wright testified as to the mortgage loan accounting system of the Bank and as to his calculation of the status of Fetner's account. Mr. Wright testified that the last payment made by Fetner was made on July 6, 1976 and that the total amount owed on account of the mortgage was $147,906.97 (R603a). Fetner's cross-examination of Mr. Wright was directed to the means by which Mr. Wright verified the figures to which he testified in chief.

Fetner's first witness was Russell Albright, the manager of the New Britain Branch of the Southeast Federal Land Bank Association. Mr. Albright was called as on cross. Prior to commencement of Mr. Albright's testimony, the following conversation occurred between counsel for Fetner and the court (R631a-635a):

"MR. BECKERT: I would like to call Russell Albright.

THE COURT: Come forward, please.

MR. HERSHENSON: I would like an offer of proof.

THE COURT: Would you state for the record what you intend to prove through this witness?

MR. BECKERT: Let me state at the outset I'm calling Mr. Albright as on cross-examination.

He's an agent of the plaintiff. He's the local officer and present manager of the New Britain branch of the Southeast Association.

THE COURT: You may call him as under cross-examination.

What do you intend to prove by this witness?

I understand you have the feeling that he may be an unfriendly witness, and I'm permitting you to call him as on cross-examination.

Assuming he will testify forthrightly to questions asked, what do you intend to prove?

MR. BECKERT: I intend to prove Mr. Albright is the agent for the Federal Land Bank—first of all, I can prove he was the agent —

THE COURT: He was what?

MR. BECKERT: That he was the agent for the Federal Land Bank of Baltimore.

That in that capacity he and Mr. Fetner and others discussed the nature of the Federal Land Bank of Baltimore, and certain representations were made to Mr. Fetner at that time regarding the nature of the Federal Land Bank in the nature of the mortgage.

THE COURT: In the nature of what?

MR. BECKERT: Of the mortgage. The nature of the position of the bank and the nature

of the commitment that Mr. Albright could make at that time representing the moneys that would be available for a loan.

That based on those reliances and those inducements, Mr. Fetner and Mr. Albright exchanged certain documents, whereby a loan application was made.

I intend further to prove that thereafter Mr. Albright did certain things.

THE COURT: Did what?

MR. BECKERT: Made certain appraisals; contacted persons who were involved in the transaction; had access to other documents, which would lead him to indicate that the nature of the transaction as he understood Mr. Fetner intended to make it may not have coincided as to his understanding as it was occurring.

That he, thereafter, acted as the agent for the bank with reference to a reduction in the commitment and explanations as to their reductions, which ignored the existence of certain facts known personally to Mr. Albright, which he neglected to state to the defendant, which were relevant to the transaction into which the defendant was going.

THE COURT: Do you have any precedent of any sort for what you're doing here?

Do you have any kind of authority for your position? If you do, I would want to recess and study it.

I'll be very frank with you: I had my law clerk study this. I have reviewed those notes that I have in such matters and I still cannot understand your position in this regard.

Your client sought funds and he received funds. He signed certain documents; as a result of that there was a settlement.

Certainly there are other collateral matters. But, I don't understand where you're going.

Do you have any legal authority for your position?

MR. BECKERT: I didn't understand Your Honor, that today, when it was never a pleading which related there was a deficiency in the counterclaim --

THE COURT: I'm not asking you what you didn't understand.

When you prepare a case, you know what the law is well before you come into court and well before depositions.

Unfortunately, I have not found that law which apparently you have found. I'm simply asking for it, because in the absence of authority I would not permit you to delve into these things.

MR. BECKERT: The theory of the case is that Mr. Albright fraudulently induced the defendant to enter into a contract.

THE COURT: In other words, Mr. Albright fraudulently induced your client to borrow

money from the Federal Land Bank; that is what you're offering to prove?

MR. BECKERT: Yes.

THE COURT: Go ahead and establish that. But stick to that."

After completion of the above colloquy, Fetner established through Mr. Albright's testimony that the witness met with Fetner and Elizabeth James in May of 1974 to formulate an application for a mortgage with the Bank (R636a). Mr. Albright stated that he told Fetner that the Federal Land Bank operated as a cooperative (R636a), that discussions centered on the eligibility of the property for a Federal Land Bank mortgage (R638a-639a), that Fetner was told that in order to obtain a loan he would have to purchase one share of stock at $5.00 value for each hundred dollars borrowed (R639a), and that the association was owned by its borrowers (R643a). He also stated that he was advised that Fetner wished to obtain 80% financing of $180,000 (R647a), that an application and financial statement was taken (R647a), that it appeared to him that the application would be favorably acted upon (R648a), and that he knew that Fetner had not then executed an agreement of sale on the property (R649a).

Mr. Albright further testified as on cross that he appraised the property for $168,000 (R651a), that his employer, the Southeast Federal Land Bank Association approved the application (R654a), and that it was then forwarded to the Federal Land Bank of Baltimore (R654a), which required more information, including what other financing was contemplated (R655a). A letter was read into the record in which Mr. Albright advised Miss James (defendant's real estate agent) (R665a), that the Bank was willing to make a loan which would net $110,544, provided that the borrower Fetner could make up the difference from other sources, which the Bank wished to know of prior to settlement (R662a). A commitment letter was ultimately issued for $109,950.63 (R667a).

Fetner also sought to establish through Albright's testimony that Albright knew of the easement through the Bank's appraisal process but that he did not disclose the existence of same to Fetner. Judge Bodley ruled in effect that such testimony was not relevant under Pennsylvania law because, as was later affirmed and restated by the Pennsylvania Superior Court on appeal, a lender or its mortgage procuring agent has no duty to search out title defects and disclose them to the borrower. The trial judge made the following statements, after which Mr. Albright's testimony was concluded (R689a, 695a):

"THE COURT: You suggested there was some fraud somewhere.

This is not the seller. This is the lending institution.

If you can offer me anything — and perhaps you should have prepared a trial brief which would have outlined the law — that you, by any stretch of your imagination, not mine, gives you the right or your client to defend this foreclosure proceeding by the nature of these counterclaims, I would be glad to hear it.

But in the absence of my finding any legal basis — You may have a conference with your client.

MR. BECKERT: Thank you."

Fetner's second witness was himself. His testimony was that he was looking, in early 1974, for a secluded horse farm to pursue his various hobbies (R696a), that he met with Mr. Albright to obtain financing on the property, that the advantages of a loan with the Bank were explained to him (R700a), that he indicated why he wanted the property (R702a), and that Albright said he would recommend the loan (R704a).

He further testified that he signed an agreement of sale on the property based on assurances by Albright that he would recommend the loan (R704a), but that the agreement of sale nevertheless contained a mortgage contingency based upon the financing discussed (R705a). Mr. Fetner further testified that he considered an August 2, 1974 letter from Albright to Miss James (R662a) to be a "commitment letter", (R710a), and that he was "enraged" and felt that Albright had "lied" to him when he learned, while out of the country, that the Bank would loan him only $117,000 (R708a).

Counsel for Fetner then sought to inquire as to contact between Fetner and Albright *following* settlement. The following transpired (R720a-722a):

> "Q. When was the next time after settlement you had contact with Russell Albright?
>
> MR. HERSHENSON: Your Honor, I must object to any contact after settlement.
>
> THE COURT: The objection is sustained as to anything after settlement.
>
> MR. BECKERT: Your Honor, are you ruling I can inquire into no contacts between the plaintiff and defendant or the defendant and Mr. Albright after settlement?
>
> THE COURT: I'm ruling it's immaterial what happened after settlement. The loan was then consummated.
>
> The documents speak for themselves.
>
> MR. BECKERT: Your Honor —
>
> THE COURT: Is there anything else of this witness?

> MR. BECKERT: May I make an offer of proof at this time?
>
> THE COURT: Is there anything else of this witness —
>
> MR. BECKERT: Well —
>
> THE COURT: —in regard to your allegations which have to do with the counterclaim and which relate to matters prior to settlement?
>
> MR. BECKERT: I have a lot of questions.
>
> THE COURT: As to fraudulent inducement?
>
> MR. BECKERT: I have a lot of questions about the counterclaim, Your Honor.
>
> THE COURT: You may have a lot of questions about what happened after settlement, and I will rule that immaterial."

Fetner was later asked by the court whether he ever fell behind in his mortgage payments. He indicated that he had (R724a) and that he thereafter contacted Mr. Albright to explain why (R724a-726a), including the fact that he had resigned from his job. Testimony was then offered to attempt to show that the Bank had agreed to "be lenient" regarding the account in 1975 and early 1976 (R736a) and that defendant brought his account current in March 1976. However, no evidence was introduced to show payment subsequent to July 1976, or to show "leniency" offers after March 1976. The court then indicated that Fetner had not produced evidence tending to show any legal defense to nonpayment subsequent to July 1, 1976 and that no evidence had been shown tending to support the counterclaims in law (R740a-746a). Mr. Fetner was asked to step down.

The trial court entered its decision on February 21, 1978 in favor of the Bank. Exceptions and supplemental exceptions were filed and were dismissed on June 15, 1978. Appeal to the Pennsylvania Superior Court followed and an opinion was issued on September 14, 1979. A petition for reargument was denied by that court on January 9, 1980. A petition for allowance of appeal was denied on December 10, 1979 by the Pennsylvania Supreme Court, and this petition followed.

REASONS FOR DENYING THE WRIT

I.

The Superior Court of Pennsylvania properly held that the trial court did not abuse its discretion in the conduct of trial herein and there is no need for review.

This case is a simple mortgage foreclosure action. It does not present any substantial federal question, nor does it deal with a conflict with any decision of this Court nor between any courts of appeals.

What occurred below was that Fetner sought to defend an action against him for failing to pay his mortgage, not by defending on the merits, but by seeking to assert, in the form of a $7,400,000 counterclaim, various claims that were unsupported in law.

He now claims, as he did below, that the trial judge was prejudiced (although he observes at page eleven of his brief, that "[i]t must be ruefully admitted that petitioner-defendant inadvertently 'fueled' Judge Bodley's prejudices."). He also claims that he was denied *proper* discovery, that he was not allowed to cross-examine *completely*, that his witnesses were not allowed *full* opportunity to testify and that he was denied an opportunity to make *final* argument. It is readily apparent that each of the claims made by Fetner here relate to the routine conduct of a civil trial and to the relationship thereof to ordinary Pennsylvania trial procedure and evidentiary questions.

With respect to his claim concerning cross-examination and examination of witnesses, it is well-established that a trial judge has broad discretion in the conduct of a civil non-jury trial and that, upon review, the standard is whether the lower court abused its discretion. *E.g., Commonwealth ex rel. Friedman v. Friedman,* 223 Pa. Super. 66, 297 A.2d 158, *allocatur denied,* 223 Pa. Super. xxxv (1972), citing *Baxter v. Philadelphia,* 426 Pa. 240, 231 A.2d 151, *appeal dismissed,* 389 U.S. 573 (1967). Of the eleven issues raised below before the Superior Court, no less than six addressed alleged trial errors. These alleged errors were thoroughly briefed and argued before the Pennsylvania Superior Court. By its affirmance below, the Superior Court recognized that the trial court exercised its discretion in the conduct of the trial without abuse. These are the same alleged errors about which Fetner now complains to this Court and which he seeks to bootstrap into "due process" questions. What is overlooked in Fetner's claims of due process violations is that the trial judge properly concluded that the majority of Fetner's alleged defenses and counterclaims were either unsupported in law or procedurally inappropriate. Consequently, evidence relating to those claims was not relevant to the trial of this matter. "Evidence which has a bearing on the issues presented by the raising of a defense is admissible, *but evidence which, if admitted, will make no defense, is properly rejected.*" (emphasis supplied). 14 P.L.E. Evidence §52, at 343.

It is in the above context that Fetner's claims of procedural error in the conduct of the trial must be viewed. Having properly determined that the only issues presented that constituted defenses or a counterclaim were Fetner's allegations of fraud in the inducement and his claim that there was no default, the trial judge insisted that Fetner limit his evidence to those points. That action was a valid exercise of the discretion of the trial judge. It is therefore apparent that most of the claims of denial of due process made by Fetner here in his brief in fact relate to the trial court's justified insistence that Fetner limit his examination and cross-examination of witnesses to matters material to those

allegations of his defense and counterclaims that were supported in law. A substantial federal question is not presented by the preceding.

With respect to those issues that *were* legally relevant herein, the trial court's statement in its opinion below that "[t]he defendant was given every opportunity to testify to facts which might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has [in] any other borrower, that is to say, an interest other than that of having its contractual payments made when due." (R782a), is amply supported by the record, as is the trial court's statement in its opinion that " . . . after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the alleged fraud if indeed it existed." (R781a). The record is replete with evidence that the trial court encouraged Fetner to produce evidence relating to fraud or to an absence of default. (*See, e.g.*, R635a, 637a, 642a, 644a, 655a, 661a, 662a, 669a, 673a, 681a, 685a, 689a.) No federal question is involved in light of the above.

The Pennsylvania Superior Court's affirmance of the conduct of the trial rested on adequate state grounds. The Pennsylvania Superior Court held, clearly and succinctly, that the trial judge properly apprehended Pennsylvania law relative to the propriety of Fetner's claims.[1] The Superior Court held as follows:

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1. It is noteworthy that the Superior Court observed that Fetner's claims were not relevant *in the mortgage foreclosure action* under Pennsylvania law. The court did not state that Fetner had no remedy. The court stated, at pages nine and ten that "appellant's remedy must be sought elsewhere," and at pages eleven and twelve that "[i]f any of them [the counterclaims] are actionable, it must be in an action not tied to this foreclosure as a Counterclaim."

"Attached to the appellant's Counterclaims were copies of Complaints filed against the sellers of the property, the estate of his real estate broker, two title insurance companies and PennDOT, averring misrepresentations and fraud in the sale of the property, most of which are repeated in his Counterclaim against the Bank.

We deal first with the appellant's claim that the Bank fraudulently withheld from him knowledge of the fact that PennDOT had obtained easement over a portion of the property nine days before the closing. At the time appellant talked to Albright, the preliminary title report, which was then available, did not include the easement because it had then not been created. Appellant does not claim that the Bank or Albright reported to him that no easement existed; he simply contends that the Bank had a duty to tell him that the title report showed an easement in PennDOT.

There is no basis for appellant's conclusion that the Bank or its mortgage procuring agent had any duty to search out defects in the title and disclose them to the appellant. Ordinarily, the relationship between the borrower and lender does not create a confidential relationship, *Grace et ux v. Moll,* 285 Pa. 353, 355, 132 A. 171 (1926), and none was shown to exist in this case.

An action based upon concealment will not lie, even as between a vendor and vendee, unless there is established an affirmative duty to disclose the existence of a title defect. *American Metal Fabricators Company v. Goldman,* 227 Pa. Superior Ct. 284, 289, 323 A.2d 891 (1974).

Ordinarily, there is no duty on the part of a lender to inspect the mortgaged property to determine that the borrower is obtaining that which he may have been promised by the vendor or that which he believes he is obtaining. Unless some further obligation is assumed, the lender's inspection of the premises to be mortgaged is made only to ascertain whether the property has sufficient value to secure the loan and is made by the lender for its benefit only.

Appellant did not contract with the Bank to review the title; he did not advise the Bank that he intended to rely on its inspection of the property; and no duty existed in law for the Bank to learn of or disclose any matter which appellant might deem a defect. If appellant was defrauded by the PennDOT easement of which he avers he was unaware, the deception was not perpetrated by the Bank and appellant's remedy must be sought elsewhere." Opinion of the Superior Court at pp. 7-10.

The Superior Court also held that:

> "The remaining Counterclaims were either unsupported by any proffer of evidence, or related to transactions or occurrences which were not part of or incident to the mortgage loan, and therefore properly excluded from consideration by reason of Rule 1148 of the PA. R.C.P. If any of them are actionable, it must be in an action not tied to this foreclosure as a Counterclaim." Opinion of the Superior Court at pp. 10-11.

Nor did the trial court improperly limit Fetner's right to present final argument. Although limitation of a right to present final argument may be a prima facie trial error in a criminal case, the rule is otherwise where, as here, the matter involved is civil and the judge has heard various arguments throughout the trial of the case. In *Commonwealth ex rel. Friedman v. Friedman,* 223 Pa. Super. 66, 297 A.2d 158 (1972), the Pennsylvania Superior Court has held as follows:

> "'A matter such as the length of argument is, of course, almost entirely within the discretion of the trial courts, see *Commonwealth v. Buccieri,* 153 Pa. 535, 551, 26 Atl. 228, 234 (1893).' *Baxter v. Philadelphia,* 426 Pa. 240, 254, 231 A.2d 151 (1967). Here, an experienced trial judge, thoroughly familiar with the law governing the case, concluded that he had heard sufficient argument on the facts during the course of the hearing and any further argument would only be repetitious." 223 Pa. Super. at 71. *See Baxter v. Philadelphia,* 426 Pa. 240, 231 A.2d 151, *appeal dismissed,* 389 U.S. 573 (1967).

Instantly, defendant had ample opportunity to argue throughout the trial. Extensive pleadings were filed, preliminary objections were briefed and ruled upon and an opportunity for the filing of briefs was allowed. Under all of the facts and the law as stated in *Friedman, supra,* the trial court's action and the Pennsylvania Superior Court's decision had an adequate basis in state law and that law does not conflict with any decision of this Court.

As previously noted, Fetner has also claimed here, as he did below, that the trial judge prejudged this matter and denied him due process of law, citing *Commonwealth v. Harrison,* 228 Pa. Super. 412, 323 A.2d 72 (1974). However, that case was a criminal case in which the trial judge involved reached premature conclusions that clearly abridged the presumption of

innocence that must be accorded a criminal defendant. Although the standards set forth in those criminal cases may well exceed those applicable in a civil action, the Bank submits that the conduct of the trial judge instantly was well within proper bounds and was not indicative of predisposition of the case. Although counsel for Fetner baldly asserts in his brief at 22, that "the matter had already been resolved by the trial judge prematurely," that statement ignores the fact that, as previously noted, the trial court continually suggested and encouraged possible relevant lines of questioning that might relate to a defense or to a proper counterclaim. A further example is recorded at page 140 of the transcript, R723a, where the following colloquy is of record:

> "THE COURT: Will you ask your client if the mortgage is current; whether he's in default; whether he's neglected to pay taxes; whether he's neglected to pay the fire insurance?
>
> I'm concerned, since your attacking the accounting that was given by the plaintiff, that this foreclosure is a proper one.
>
> Certainly if Mr. Fetner paid every payment when due and paid the taxes and insurance premiums, which he's obliged to pay, certainly there would be a defense to the foreclosure.
>
> I don't know if you choose to ask him that. I trust that Mr. Hershenson will. If he doesn't, I will; because I want to know from him whether this is a proper foreclosure or not."

Fetner's claim of prejudice is thus likewise insubstantial.

Fetner's claim that the trial court erred relative to discovery allowed by it and by allowing the Bank to call a witness whose name was not known until the day of trial also presents no basis for review by this Court.

With respect to his allegation that the trial court should not have allowed the testimony of the Bank's two witnesses because their names were not furnished to him prior to trial, the Bank notes that witness Carpenter was *deposed* before trial. Although Fetner characterized Mr. Carpenter as a "surprise witness," the record reflects that *Fetner* subpoenaed him for trial (R589a).

With respect to witness Wright, Fetner cites *Nissley v. Pennsylvania Railroad Company,* 435 Pa. 503, 295 A.2d 451, *cert. denied,* 397 U.S. 1078 (1969) for the proposition that failure of a party to disclose the names of witnesses prior to trial constitutes grounds for exclusion of the testimony of the witness whose name was not furnished. However, counsel for Fetner misapprehends the rule stated in that case. The general rule applicable to this question in Pennsylvania is that the trial court has *discretion* with regard to allowing testimony by witnesses whose names are not disclosed prior to trial pursuant to a request for same contained in interrogatories. There is no specific sanction under Pennsylvania law for failure to disclose the names of witnesses. *Tener v. Loblaw, Inc.,* 207 Pa. Super. 337, 217 A.2d 787 (1966). The rule may be otherwise *with respect to expert medical* witnesses by virtue of the decisions cited by Fetner. In *Nissley,* the expert witness whose name was not disclosed was an expert medical witness who testified concerning a critical and complex issue of medical causation. There, *the element of surprise* was viewed as particularly crucial, given the nature of the case. *See Nissley v. Pennsylvania Railroad Co., supra,* 435 Pa. at 509. In contrast to the preceding, the witness herein was presented to prove the amount of the default as of the date of the trial. In that respect, his testimony was virtually co-extensive with the allegations of paragraph ten of the complaint (R10a), which were well known to defendant prior to trial. Although the witness also testified concerning the procedure by which his calculations were reached, the record discloses that his testimony in that regard was not unique or unusual in an action of the type pursued here. Moreover, defendant had obtained information concerning the procedure employed by the Bank and with respect to many of

the figures during his depositions of Carpenter and Albright. (*See* R295a-319a, 523a-524a, 539a-541a.) The qualifications of Mr. Wright were not of critical importance and he was not expressing an opinion. Finally, and most importantly, the record clearly indicates that counsel for defendant was not sufficiently surprised to preclude him from engaging in pertinent cross-examination (*See* R608a-624a.) The Superior Court's decision on this point was properly based upon state law and presents no federal question; it is not in conflict with any decision of this Court.

II.

The Superior Court properly held that the trial court was correct in dismissing those counterclaims which were based upon federal securities law.

The second issue posed by Fetner in his petition, whether the loan program of the Bank was subject to federal securities laws, is simply irrelevant to this action. A determination that the Bank's loan process is or is not subject to the cited statutes is unnecessary to the decision below and can have no effect upon the ultimate outcome of this mortgage foreclosure action.

Fetner's Counterclaim XI below alleged that failure to disclose the existence of a PennDOT easement constituted a fraudulent omission of a material fact under applicable securities laws. The question whether the Bank is a "an instrumentality of the Government of the United States," thereby exempting it from the Securities Act of 1933, 15 U.S.C.A. §77c(2), has no bearing on this action because even if the securities acts are applicable to the Bank, a counterclaim which states a cause of action which is within the exclusive jurisdiction of the federal courts is properly stricken under Pennsylvania law. The statutes cited by Fetner are clearly pursuable in a federal forum and provide a federal remedy based upon a federal statute, not a cause of action pursuable in the courts of Pennsylvania (Fetner admits, at page 27 of his brief here, that jurisdiction over this

claim is exclusively vested in the federal courts). Moreover, the arguable remedy for the alleged fraud under the securities acts relates to the validity of the securities transaction, not to the mortgage transaction. Finally, the securities question posed by Fetner goes to the purchase of stock which was incidental to the loan transaction; it does not arise out of the same transaction (default in the mortgage), the transaction upon which the cause of action of the Bank was based. Pa. R.C.P. No. 1148.

Neither the trial court nor the Pennsylvania Superior Court found it necessary to decide whether the Bank's stock was subject to exemption under the Securities Act of 1933 or the Securities and Exchange Act of 1934. In fact, neither directly addressed that question because each implicitly decided that any violation thereof was not procedurally cognizable as a counterclaim to this mortgage foreclosure action under Pennsylvania civil procedure. Therefore, this Court need not decide that issue, nor would a decision that the Bank is subject to the cited acts have any effect on the outcome herein, absent a concurrent rewriting by this Court of Pennsylvania Civil Procedure and Pennsylvania Rule of Civil Procedure No. 1148.

Under the above circumstances, it is respectfully submitted that this Court need not and should not review this question.

CONCLUSION

Fetner's petition for a writ of certiorari should be denied because there is no overriding reason why the writ should be granted. No conflict between circuit courts of appeals or with a decision of this Court is involved and there is no important question of federal law of wide applicability that needs to be reviewed. The decision below was based upon adequate state grounds and does not involve a substantial federal question.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY

CIVIL

NO. 77-2577-04

MORTGAGE FORECLOSURE

FEDERAL LAND BANK OF BALTIMORE

vs.

PHILIP JAY FETNER

In this mortgage foreclosure action, defendant has appealed to the Superior Court from our entry of a Decision, after trial without jury, in favor of plaintiff and against defendant in the sum of $137,195.45, together with interest and costs of foreclosure, and from our dismissal of defendant's Exceptions thereto.

In its complaint plaintiff alleges a straightforward real estate transaction under which defendant borrowed from plaintiff the sum of $117,500.00 secured by a mortgage upon some twenty five acres, with improvements erected thereon, located in Nockamixon Township, this County. Alleging default in payment of monthly installments from July 1, 1976 to February 1, 1977, totalling $8,106.36, and further alleging defendant's failure to pay real estate taxes in the sum of $1,659.16, plaintiff exercised its right of acceleration under the terms of the mortgage and demanded judgment for the unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

Appendix A

In a prolix Answer, New Matter and Counterclaim, defendant, inter alia, denied that the instrument sued upon "is a mortgage", denied having defaulted, denied that real estate taxes were due "under the terms of the mortgage" and alleged "that after reasonable investigation", defendant had been unable to gain sufficient knowledge from which to form a belief as to the truth of the averment that the amount claimed was due plaintiff.

Defendant's New Matter and Counterclaim contain 169 paragraphs. In New Matter defendant alleges that Federal Land Bank of Baltimore does business within the Commonwealth of Pennsylvania and is in violation of the registration requirements imposed upon foreign corporations under 15 P.S. 2014. He challenges the attorney's fee of 10% provided for in the agreement, alleging that it is excessive. He acknowledges that he had made a long-term "residence home loan". And, finally, he incorporates by reference an Amended Complaint in a non-related action brought by defendant against his grantors, Dr. Stewart Haggerty and Martha Haggerty, his wife, Commonwealth Land Title Insurance Company, and Doylestown Title and Abstract Co., Inc., which companies issued title insurance at the time of his purchase on October 9, 1974, the Estate of Elizabeth James, deceased, who had traded as Elizabeth James Country Real Estate and was the realtor who handled the sale and assisted in securing the mortgage loan, and the Commonwealth of Pennsylvania, Department of Transportation, condemnor of an easement over the land.

In Count I of his counterclaim against plaintiff defendant, an attorney-at-law, then incorporated by reference the substance of his Answer and New Matter and alleges, in substance, that plaintiff fraudulently concealed from him its knowledge of an easement granted Penndot prior to his settlement. He thereupon claimed damages from plaintiff "in excess of the sum of $250,000.00 or in the alternative $180,000.00, and in addition thereto punitive damages in the sum of $500,000.00, together with costs of suit and legal interest". Ten more counts follow.

Appendix A

Count II alleges that for some time past defendant had "repeatedly questioned" the accuracy of statements of his account received from plaintiff, alleged that statements had been sent "too late to pay the amount owed or some time not at all", claimed that defendant had repeatedly asked plaintiff to discuss discrepancies but that such requests had been refused by plaintiff, and alleged that he therefore was unable to determine "what amounts if any are due". Defendant then alleged that "it is clear that plaintiff has acted in bad faith in its dealings with him" in order "to create a delinquency and force a foreclosure so as to avoid and moot the litigation regarding the purchase of the property, in which plaintiff was fraudulently involved".

Defendant asserts that plaintiff's "actions" (presumably its alleged mailing of statements and refusal to discuss the account with defendant) were "intentional, wilfull and malicious, and done, in part, for the purpose of forcing defendant out of said property". These actions of plaintiff, defendant claims, cost him "substantial time, numerous legal fees and expenses, great aggravation, . . . possible loss of property", and "extensive credit problems" which led him to demand, in Count II, compensatory damages of $200,000.00 and punitive damages of $500,000.00.

Here it would be appropriate to refer to the litigation in which defendant herein seeks recovery against his grantors, the title insurance companies, the realtor, and the Commonwealth. In essence plaintiff therein avers that the realtor served as an agent for him in his search for "a suitable and secluded gentleman's country estate and horse farm in the Bucks County area" and had prior to the execution of the agreement of sale with the grantors on June 5, 1974, informed the defendant that the many trees, shrubs and plantings on the property, setting the natural boundaries thereof, gave it that "certain beauty, unique privacy and distinct character" which was "especially suitable for the gentleman's country estate and horse farm" that the defendant was looking for. Then, alleging the execution of the

agreement of sale with the grantors, defendant alleges that he sought title insurance through the title company defendants, and secured a preliminary title report from them on June 10, 1974. He then alleges that thereafter, on July 29, 1974, and subsequent to the execution of the agreement of sale, his grantors "covertly and in controvention of the terms of the agreement", executed a deed of easement which conveyed to the Commonwealth of Pennsylvania, Department of Transportation more than 7,000 square feet of land covered by trees and shrubs, a part of the natural boundary of the property. He went on to aver that the deceased realtor had represented to him that no highway expansion was planned on or near the property and that relying upon the alleged misrepresentation of the deceased realtor he took possession of the property only to learn thereafter that a planned expansion by PennDOT was well known to area residents prior to the execution of the agreement. Defendant concluded that his grantors thus acted fraudulently.

Defendant, in that action, went on to allege that prior to his settlement on October 9, 1974 the defendant title insurance companies issued its policy of insurance without reference to the deed of easement referred to above which, he averred, had been recorded on October 1, 1974. He termed the title companies "grossly negligent", the grantors the "perpretrators of fraud", the Commonwealth as "co-conspirators" with the grantors as well as "trespassers" who maliciously destroyed certain trees on the property "and consequently severely altered the character of the property and thereby greatly reduced the value thereof".

Defendant sought by way of Count I of the collateral action against his grantors and others (a) compensatory damages in the sum of $180,000.00 (the purchase price of the property), plus all interest thereon paid by defendant plus costs and expenses incurred by him in connection with his intended recission of the agreement, (b) the sum of $50,000.00 for reimbursement for alleged improvements made by this defendant to the property and (c) punitive damages in the sum of $500,000.00 for the

"gross, wilfull, wanton, malicious and fraudulent misrepresentation [of his grantors, et al] which have irreparably damaged plaintiff". Alternatively in Count I of the collateral action, this defendant sought damages in excess of $150,000.00 which allegedly represented value of the destroyed trees, shrubs and plantings" and punitive damages in the sum of $500,000.00 for those defendants' alleged gross, wilfull, wanton and malicious and fraudulent misrepresentations.

Count II of this defendant's said complaint incorporates by reference a substantial portion of Count I within it and seeks damages from the defendant title insurance companies in a sum in excess of $100,000.00 for breach of contract in failing to discover the deed of easement allegedly conveyed to his grantors by PennDOT and allegedly recorded October 1, 1974.

Now, we return to the present action. Count III incorporates into this unusual mortgage foreclosure another dimension and, of course, incorporates by reference much of the Answer, New Matter and Counterclaim which preceded and followed those allegations in Count III. Here defendant states that in November 1974, "as a result of exposing corporate overseas bribery and a dispute with his [defendant's] employer, defendant was forced to leave his position as a result of a dispute with his employer", which left him without a regular source of income. It is then alleged that upon being informed by defendant of these problems, plaintiff had told him it would, if necessary, give him the time needed to establish his "income flow" and thereupon defendant relied upon such assurances and made further improvements to the property as well as "substantial investments in new business ventures".

He then complains in Count III of his counter claim that although late in making his July 1975 payment he had requested that plaintiff not release information concerning the overdue

nature of the account and, as well, requested that "all communications with Defendant in Fetner v. Haggerty, et al. be very circumspect".

Plaintiff agreed, according to defendant, but notwithstanding such agreement had disclosed to a prospective lender from whom defendant sought short-term financing that the mortgage payments were indeed three months overdue and that it was considering some type of legal action. As a consequence, said defendant, "all financing fell through" and moreover his grantors' attorney learned that foreclosure proceedings were imminent as a result of which "all serious settlement discussions were terminated by them." Concluding that such alleged disclosures made by plaintiff were in violation of the Federal and Pennsylvania Truth in Lending Act and Fair Disclosure of Credit Act, and "related statutory provisions", in violation of a duty owed by plaintiff to defendant and in violation of "agreements and understandings" made between plaintiff and defendant, defendant alleged that plaintiff's actions were for the purpose of forcing a foreclosure in order to render moot and conceal the "original fraud". For this behavior as well as for his loss of credit, "economic losses relating to his profession", etc., defendant demanded judgment of the additional sum of $275,000.00 against his mortgagee by way of compensatory damages, and $700,000.00 in punitive damages.

Count IV relates to matters preceding the mortgage commitment and at settlement. Specifically defendant complains that plaintiff did not afford him with 80% financing which he had allegedly been told was available, but instead offered him 60% financing which due to the pressure of time, he alleges, he was obliged to accept, all to his detriment. He also complains of plaintiff's requirement concerning secondary financing. Alleging that plaintiff's representation concerning interest rates and representations concerning separate secondary financing were false and fraudulent and made "with the intent to deceive and defraud defendant and to induce him to obligate himself to

plaintiff for mortgage financing", defendant in this Count demands judgment of $50,000.00 in compensatory damages.

In Count V of the counterclaim defendant asserts that both in 1975 and 1976 plaintiff, without advance notice to defendant, paid school taxes due upon the mortgaged real estate and then demanded reimbursement for the sums paid together with interest all the while knowing of defendant's "cash flow problems". These school tax payments made by plaintiff, according to defendant, were made in order that there might be justification to foreclose and deprive defendant of the property and to "moot and conceal the original fraud by plaintiff". Accordingly, defendant demanded $100,000.00 in compensatory damages and $500,000.00 in punitive damages.

In Count VI defendant avers that he is a "good, honest and virtuous citizen who was an esteemed member of the community in credit and reputation". Alleging that plaintiff's "actions" injured his good name, fame and reputation resulting in his loss of credit, economic harm, humiliation, embarrassment, aggravation, etc., etc., defendant demands judgment of $400,000.00 in compensatory damages, together with $700,000.00 punitive damages.

Count VII alleges that certain provisions in the mortgage which he had signed were "unconscionable, illegal and/or unenforceable" and were inserted in the mortgage, as defendant sees it, with some malicious intent, thus entitling him to judgment against plaintiff in the sum of $50,000.00, compensatory damages and $500,000.00 in punitive damages.

In Count VIII defendant expressed the belief that plaintiff, prior to settlement had in its possession a survey of the property and a preliminary title report which it failed to reveal to him in breach of a duty owing him. And alleging that such behavior on the part of plaintiff, his mortgagee, was intentional and

malicious, designed to cause him substantial harm, defendant asks this Court to award him the sum of $250,000.00 compensatory damages and $500,000.00 punitive damages.

Count IX states that on August 10, 1976 defendant sent plaintiff a check in the amount of $2,000.00 which had not been credited to his account and avers that plaintiff refused to check its records to determine whether such payment had been received, as a result of which defendant was forced to spend time and legal fees, with the further result that he suffered losses in time from his business and loss of credit. Since this behavior on the part of plaintiff was also averred to have been intentional, malicious and wanton and to create a foreclosure posture, defendant asked for judgment of $50,000.00 compensatory damages and $250,000.00 punitive damages.

In Count X of his counterclaim defendant complains, in essence, that although it had been represented to him that plaintiff had a very lenient attitude in the event "any payment problems would arise", nonetheless when defendant's "cash flow problems" presented themselves, plaintiff went ahead with its foreclosure action. Defendant recites at great length the efforts that he had made to forestall foreclosure and charges plaintiff with having acted fraudulently and with the malicious intent to "moot the question of the original fraud", all to his great damage. Wherefore he claimed once more of plaintiff the sum of $200,000.00 in compensatory damages and $1,000,000.00 in punitive damages.

Finally, in Count XI, after incorporating paragraphs, one through one-hundred seventy of the Answer, New Matter and Counterclaim (Count XI is initiated with paragraph 171) defendant charges plaintiff with having violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. He further charges that plaintiff's failure to inform him of the existence of an easement across the

property, financed by plaintiff for defendant, was a fraudulent omission of a material fact contrary to the 1934 Act. The prayer for relief under Count XI calls for the "recission of the entire loan transaction, refund of all interest paid, and damages in the amount of $500,000.00 both pecuniary and punitive . . . ."

So that it might not be thought that the writer of this opinion may be guilty of that prolixity which he finds in defendant's Answer, New Matter and Counterclaim, let it be said that he deemed it necessary to outline defendant's pleadings in as succint a fashion as possible (under the circumstances) in order that the Superior Court might better understand the events which took place at the trial of the matter and which are here submitted for scrutiny.

The Superior Court may be asked to review the total of forty-six Exceptions filed to the proceedings in all of its aspects. Defendant has not favored us with a statement of the precise matters complained of but we shall assume that he will brief and argue all issues excepted to. We shall address but a few of them and even these which we mention, in our opinion, are without merit on their face. It should be added, gratuitously, that had plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith. That was not done. Hearing was scheduled and held.

The record will reveal that two witnesses were offered by plaintiff through whom the mortgage, mortgage bond, and so-called real estate mortgage bond were introduced and received in evidence. Testimony established that the Federal Land Bank was chartered under an Act of Congress in 1916 and under the Farm Credit Act of 1971. It receives no Federal funds from the government and exists in order to make mortgage loans to farmers.

A "statement of debts" of this defendant was also received into evidence which reflected that his total debt as of February

15, 1978 (the date of hearing) including unmatured principal of $112,600.00, various installments due, tax insurance advances, fire insurance advances, interest to October 14, 1978 and attorney's commission, totalled $147,906.97.[1] The last payment made by this defendant upon his mortgage obligation was July 6, 1976, one year and seven months prior to the hearing. He has remained a resident of this "gentleman's farm" throughout this period of default. During cross-examination of plaintiff's witnesses, defense counsel made numerous efforts to inquire into all manner of matters not germane to the foreclosure question (See e.g., N. T. pp-42-46). This was not permitted.

After plaintiff rested its case defendant called an agent of the plaintiff who dealt with defendant when he sought the mortgage loan. In connection with counsel's examination of this witness the hearing judge, for the first of many times thereafter during a long day, suggested to defense counsel that having alleged fraud in various manners on the part of plaintiff, he should set about proving it. (N. T. p. 52). Objection after objection was sustained by the trial judge to questions which went neither to plaintiff's right to foreclose nor to the alleged fraud. (See e.g., N.T. pp. 99 through 112). At that point further examination of plaintiff's agent was denied defense counsel. Of this defendant complains. We shall respond to that complaint merely with a suggestion that a review of counsel's examination of the witness will amply justify the Court's action.

Thereafter the defendant testified. He was given great latitude. Once again, after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the

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1. "Our decision erroneously stated $137,195.45, the amount originally claimed".

alleged fraud if indeed it existed. No evidence was forthcoming and we are satisfied that none existed. The extravagant representations made by this defendant in his lengthy Answer, New Matter and Counterclaim speak for themselves. The defendant was given every opportunity to testify to facts which arguably might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has any other borrower; that is to say, an interest other than that of having sufficient security for the loan it advanced and an interest in having its contractual payments made when due.

Accordingly, the Court refused to hear further testimony from the defendant, being satisfied that the testimony offered was as lacking in merit, and at times in credibility, as was the defendant's pleading. Few reported cases discuss defenses and counterclaims in mortgage foreclosure actions. Certainly, payment, fraud in the inducement, want of consideration, release, setoff, and denial of execution of the mortgage, may be pleaded by way of defense in answer to a complaint in foreclosure. P.L.E. Mortgages, Section 225. On the issue of fraud, Section 225 states:

> "If defendant intends to insist on a fraud in fact, it is not sufficient to allege in the answer facts from which an inference of fraud may be drawn. Fraud must be charged distinctly."

Counterclaims in foreclosure actions are governed by Pa. R.C.P. 1148 which states:

> "A defendant may plead a counterclaim which arises from the same transaction or occurrences or series of transactions or occurrences from which plaintiff's cause of action arose."

According to 3A Anderson, Pa. Civ. Prac. Section 1048.4 and 1048.5, a defendant may properly counterclaim for damages for

breach of warranty of title, or for any unliquidated claim which the parties had agreed to adjust when the mortgage came due, but, defendant may not counterclaim for unliquidated damages from torts unrelated to the mortgage action. In briefing the question counsel have referred us to very few cases which speak to the specific matters before us. In *First Federal Savings and Loan Association v. Street Road Shopping Center Inc.*, 68 D. & C. 2d 751 (Bucks 1975), affirmed 238 Pa. Superior Ct. 770 (1975), it was held that a mortgagee does not waive its right to foreclose by accepting late payments. It was further held that in that case a 5% attorney's fee was reasonable where the debt exceeded $300,000.00. In *Kornicki v. Abrams,* 28 Bucks Co. L. Rep. 215 (1976) it was held that a mortgagee is under no duty to inspect the premises to be mortgaged.

On the issue of taxes, counsel for plaintiff has referred us to *Pennsylvania Trust Co. v. Earnest,* 128 Pa. Superior Ct. 331 (1937) wherein it was held that it is proper for a mortgagee to pay taxes when they become delinquent. Unfortunately, on the issue of fraud, counsel have referred us to no mortgage foreclosure case dealing with factual averments which are even vaguely similar to the one at hand and none have been found. No doubt none exist nor will hereafter arise.

We believe that the 10% allotted for counsel fees is appropriate in this case. Such fees have been previously allowed. See *Plum Tree Inc. v. Seligson,* 224 Pa. Superior Ct. 471 (1973); *Mack v. Fennell,* 195 Pa. Superior Ct. 501 (1961). Such attorney's fees are properly includable in a judgment and belong to a plaintiff. *Commonwealth v. Pennsylvania Loan Corp.* 127 Pa. Superior Ct. 253, 256 (1937). True, such fees must be reasonable. However, reasonableness must be determined by the circumstances of each case as stated in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.*, 196 Pa. Superior Ct. 155, 160 (1961) at page 160:

> "The mortgagee, having loaned a fixed sum of money should recover both principal and interest without dimunition for expenses which he might be forced to pay."

The extent of services rendered by counsel in this case, given the fact that the complaint was filed on March 16, 1977, given the fact that defendant chose to file his meritless Answer, New Matter and Counterclaim, take lengthy depositions thereon, demand trial in an effort to forestall foreclosure, and given the fact that counsel was obliged to engage in lengthy preparation for trial, as well as spend a day on trial, satisfies us that the counsel fee allowed is reasonable under the circumstances. It should be added, obviously, that defendant has now appealed to the Superior Court. In this connection counsel is called upon to brief and argue plaintiff's position before that Court, thus leading to substantial additional expense to plaintiff for counsel fees.

In brief, it is the writer's judgment that this defendant has acted in bad faith from the inception of the mortgage foreclosure action. Since July 1, 1976 to date, as was acknowledged on July 25, 1978, defendant has continued to enjoy residence and conduct a business at the foreclosed real estate, while plaintiff-mortgagee continues to advance funds for the payment of real estate taxes, and necessary insurance. He has not pleaded a valid defense to the foreclosure action and has not proved one. While having pleaded fraud at great length in his New Matter and Counterclaim, it is quite obvious that there is no substance in the same.

For these reasons we entered judgment against defendant.

BY THE COURT:

s/ J. J. Bodley
J.

September 8, 1978